

1949
SUPPLEMENT
TO
FEDERAL PROCEDURAL
FORMS
FOR USE IN
FEDERAL COURTS
AND BEFORE
ADMINISTRATIVE AGENCIES

~~ED~~
ANNOTATED

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PUBLISHER'S NOTE

During the war and while Mr. Cozier was serving with the armed forces, Mr. Holtzoff prepared the 1944 Supplement. Subsequently he was appointed to a United States District Judgeship. He then decided that his continuance as associate editor of Federal Procedural Forms was incompatible with his position as judge.

In the meantime Colonel Cozier had returned to his position as Special Assistant to the Attorney-General and assumed responsibility for the preparation of this Supplement. He enlisted Mr. Herbert E. Hoffman, who is also a Special Assistant to the Attorney-General, as his aide. In addition to their positions as Special Assistants to the Attorney-General Mr. Cozier is a member of the District of Columbia Bar and Mr. Hoffman is a member of the New York State Bar.

Messrs. Cozier and Hoffman have added forms which cover a wide range of subjects, in addition to those prepared by Judge Holtzoff in the 1944 Supplement. The new forms include actions under the Federal Tort Claims Act, reemployment under the Selective Service Training Act, motions, orders, answers, affirmative defenses and replies. One of the very important additions covers appeals from a state Supreme Court to the Supreme Court of the United States and its antithesis—certiorari to a state Supreme Court. The other feature of great importance is the bringing of the Rules of Civil Procedure down to date. This includes the Amendments adopted in 1946 and those made on December 29, 1948. These latter amendments will not take effect until after adjournment of this session of Congress. However, it would seem that this provision as to effective date is relatively immaterial, since practically everyone of the changes made did nothing more than make the verbiage of the form correspond with that of the new Judicial Code approved June 25, 1948 and which became effective September 1, 1948.

The new Criminal Procedure rules and forms for the United States District Courts with December 27, 1948 amendments, are included. What was said concerning the Rules of Civil Procedure also applies to the Rules of Criminal Procedure. The 1948 amendments in effect do nothing more than make the language of the forms correspond to that of the new Criminal Code which was also approved on June 25, 1948 and which became effective on September 1, 1948. The criminal law forms, with the exception of four, are all new.

Many inquiries have been received concerning when a new Supplement would be issued. On account of our knowledge that changes were

in the making the Supplement was delayed until the uncertainty had been removed and a Supplement could be furnished our subscribers which would not be obsolete by the time it was issued and which would give promise of usability over a period of years.

The name of the District Court of the United States has been changed to "United States District Court," (title 28, § 132 of the new judicial code) and that of the United States Circuit Court of Appeals to "United States Court of Appeals" (title 28, § 43 of the new judicial code). Consequently in using forms in the parent volume these changes should be kept in mind.

FEDERAL PROCEDURAL FORMS

PART ONE—CIVIL ACTIONS

CHAPTER 2—SUMMONS

Form

34. Motion to limit service on numerous defendants.

Form

35. Order limiting service on numerous defendants.

34. Motion to Limit Service on Numerous Defendants.

(Caption.)

The defendant CD moves for an order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants, that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense shall be deemed to be denied or avoided by all other parties to this action, and that the filing of any such pleading and service thereof upon the plaintiff shall constitute due notice of it to the parties.

This motion is made on the ground that there is an unusually large number of defendants in this action, to wit —, —, and —, and that it would be unnecessarily burdensome to require service of defendants' pleadings and replies thereto, as between defendants.

Date —.

Attorney for defendants.

Address.

Cross-Reference.

See Rule 5 (c) of the Rules of Civil Procedure, p. 903 of parent volume.

35. Order Limiting Service on Numerous Defendants.

(Caption.)

This cause came on to be heard on a motion of defendant CD, for an order that service of the pleadings of the defendants and replies thereto need not

be made as between the defendants; and it appearing that there is an unusually large number of defendants in this action, to wit —, —, and —, it is hereby

Ordered, that service of the pleadings of the defendants and replies thereto need not be made as between the defendants; and it is further

Ordered, that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties; and it is further

Ordered, that the filing of any such pleading and service thereof upon the plaintiff shall constitute due notice of it to all parties to this action; and it is further

Ordered, that copies of this order shall be served upon the parties as follows: [Here insert].

Date —.

United States district judge.

Cross-Reference.

See Rule 4 (c) of the Rules of Civil Procedure, p. 902 of parent volume.

CHAPTER 4—COMPLAINTS

SECTION 3—CLAIMS FOR RELIEF

| Form | | Form | |
|-------|---|-------|--|
| 84A. | Complaint in action on judgment. | 105C. | Complaint in spurious class action—Fraudulent sale of stock. |
| 85A. | Complaint for negligence. | 105D. | Complaint for libel. |
| 85B. | Complaint by husband and wife for personal injuries to wife. | 118. | Complaint under Fair Labor Standards Act. |
| 92A. | Complaint in action for issuance of patent. | 119. | Complaint under Emergency Price Control Act. |
| 94A. | Complaint for interpleader and denying liability. | 119A. | Complaint for relief in the nature of mandamus. |
| 95A. | Complaint for declaratory judgment on insurance policy. | 119B. | Complaint by employee to review order under Longshoremen's and Harbor Workers' Compensation Act. |
| 96A. | Complaint under Federal Tort Claims Act. | 119C. | Complaint by employer to review order under Longshoremen's and Harbor Workers' Compensation Act. |
| 96B. | Complaint under Federal Tort Claims Act. | 119D. | Complaint for reemployment under the Selective Training and Service Act. |
| 103A. | Complaint for triple damages under antitrust laws. | | |
| 105A. | Complaint in true class suit—Trust estate. | | |
| 105B. | Complaint in spurious class action — Validity of reissued patent. | | |

84A. Complaint in Action on Judgment.

(Caption.)

1. Allegations of jurisdiction.
2. On —, 19—, at —, the plaintiff recovered a judgment against the defendant in — Court, for the sum of — dollars (\$—), in an action entitled "AB, plaintiff, against CD, defendant." No part of said amount has been paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of — dollars (\$—), with interest from — —, 19—, and costs.

Attorney for plaintiff.

Address.

Source of Form.

Bower v. Casanave (D. C.-N. Y.), 44
Fed. Supp. 501.

85A. Complaint for Negligence.

(Caption.)

1. Allegation of jurisdiction.
2. On — —, 19—, on a public highway called —, in —, —, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway. The plaintiff at that time was exercising due care and was free from contributory negligence.
3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of — dollars (\$—).

Wherefore, plaintiff demands judgment against defendant in the sum of — dollars (\$—) and costs.

Attorney for plaintiff.

Address.

Note.

The burden of pleading and proof on the issue of contributory negligence is a matter of substantive law rather than procedure and hence is governed by state

law. *Palmer v. Hoffman*, 318 U. S. —, 87 L. ed. —, 63 Sup. Ct. 477. The foregoing form is suitable in a jurisdiction where plaintiff has the burden on that issue.

85B. Complaint by Husband and Wife for Personal Injuries to Wife.

United States District Court

— District of —

— Division

AB and CD,

Plaintiffs,

v.

XY

Defendant.

The plaintiffs, by —, their attorney, allege

1. Allegation of jurisdiction.
2. At all times hereinafter mentioned the plaintiff AB was and now is the husband of the plaintiff CD.

3. On ———, 19—, on a public highway called ——— Street, in ———, Massachusetts, the defendant negligently drove a motor vehicle against plaintiff CD who was then crossing said highway.

4. As a result, plaintiff CD was thrown down and had her leg broken and was otherwise injured, and suffered great pain of body and mind to her damage in the sum of ——— dollars (\$——); and plaintiff AB incurred expenses for medical attention and hospitalization of the plaintiff CD and was deprived of her services for a long period of time to his damage in the sum of ——— dollars (\$——).

Wherefore, plaintiff AB demands judgment against the defendant for the sum of ——— dollars (\$——) and costs; and plaintiff CD demands judgment against the defendant for the sum of ——— dollars (\$——) and costs.

Attorney for plaintiffs.

Address.

Note.

The foregoing form is a modification of Form 85 on page 59 of parent volume (Official Form 9) to fit a joint action by

husband and wife, in accordance with *Lansburgh & Bros., Inc. v. Clark*, 75 App. D. C. 339, 127 Fed. (2d) 331.

92A. Complaint in Action for Issuance of Patent.

United States District Court
for the District of Columbia

AB, Inc.,

Plaintiff,

v.

Commissioner of Patents.

1. This action arises under Revised Statutes, section 4915 (U. S. C., Title 35, § 63). No appeal has been taken herein to the United States Court of Customs and Patent Appeals.

2. The plaintiff, AB, Inc., is a corporation organized and existing under the laws of the state of ———, having its principal office and place of business at ———.

3. On ———, 19—, one XY filed an application for patent in the United States Patent Office, entitled “——” which was given serial No. ———. Said application was assigned to the plaintiff and said assignment was duly recorded in the United States Patent Office.

4. Claims Nos. ———, ———, and ———, of said application were finally rejected by the primary examiner and on appeal taken from his decision, the Board of Appeals affirmed said decision. The defendant has refused and still refuses to grant a patent on said application as to claims Nos. ———, ———, and ———.

5. The claims in issue are as follows: [Here insert text of claims].

Wherefore, the plaintiff demands judgment directing the Commissioner of Patents to issue a patent to the plaintiff including said claims.

Attorney for plaintiff.

Address.

94A. Complaint for Interpleader and Denying Liability.

(Caption.)

1. Allegations of jurisdiction.

2. AB Corporation, the plaintiff, at all times hereinafter mentioned was and now is engaged in the business of writing surety bonds.

3. During the years — and —, CD Corporation, was a corporation organized and existing under the laws of the state of —, and engaged in the business of sale, transfer, and exchange of securities in that state. Under the laws of that state, said CD Corporation was required to file a bond in the sum of — dollars (\$—), with the Commissioner of Corporation Registration of that state, running to the people of the state of —, conditioned upon faithful compliance by the CD Corporation and its salesmen with the laws of the state of —. On — —, 19—, such a bond was executed and delivered by CD Corporation as principal and the plaintiff as surety.

4. Thereafter numerous actions were instituted by the defendants herein against CD Corporation and against this plaintiff to recover damages for alleged breach of the bond. The aggregate amount claimed in said actions far exceeds the amount of the bond.

5. This plaintiff alleges that it is not liable to any of the defendants. If the plaintiff is liable, its total liability is limited to the sum of — dollars (\$—). By reason of the conflicting claims of the defendant, the plaintiff is in great doubt which defendant or defendants, if any, are entitled to be paid and, if so, in what proportions or amounts.

Wherefore, the plaintiff demands judgment:

1. That each of the defendants be enjoined and restrained from instituting or prosecuting any action on the bond hereinabove referred to.

2. That the plaintiff is not indebted to any defendant.

3. That the plaintiff's aggregate liability, if any, is the sum of — dollars (\$—).

4. That, if the plaintiff is liable to the defendants or any of them, the defendants be required to interplead and settle among themselves their rights to the aforesaid amount, and that the plaintiff be discharged from

all liability in the premises except to the persons whom the court should adjudge entitled to the amount of said bond.

5. That the plaintiff recover its costs.

Attorney for plaintiff.

Address.

Source of Form.

Standard Surety & Casualty Co. v.
Baker (C. C. A. 8), 105 Fed. (2d) 578.

95A. Complaint for Declaratory Judgment on Insurance Policy.

United States District Court

District of _____

Division

AB Insurance Company,

Plaintiff,

v.

CD,

Defendant.

1. Allegations of jurisdiction.

2. On _____, 19—, the plaintiff issued to the defendant an insurance policy on the life of the defendant for the sum of _____ dollars (\$—), in consideration of payment of premiums by the defendant, as provided in the policy. The said policy contained among other things the following provisions: [Here quote disability benefits and waiver of premiums provision].

3. On _____, 19—, and at various times thereafter the defendant made false representations to the plaintiff that he was totally and permanently disabled, knowing said representations to be false and intending that plaintiff should rely on them. On the basis of such representations the defendant submitted to the plaintiff on _____, 19—, and at various times thereafter, claims for benefits alleged to be due under the policy and for waiver of premiums.

4. The plaintiff relied on said representations to its damage, being ignorant of their falsity and reasonably believing them to be true, and in reliance thereon, paid to the defendant disability benefits under the policy aggregating the sum of _____ dollars (\$—), and waived premiums due under the policy aggregating the sum of _____ dollars (\$—). In fact and in truth the defendant was not totally or permanently disabled at any of the times aforesaid.

Wherefore, plaintiff prays for a declaratory judgment determining that defendant was not totally or permanently disabled at the times above stated, whether plaintiff is entitled to set off the amount due it from defendant by reason of aforesaid fraud as against any rights of defendant

in the policy, and judgment against the defendant for the sum of — dollars (\$——), with interest and costs.

Attorney for plaintiff.

Address.

Source of Form.

Mutual Life Ins. Co. v. Krejci (C. C. A. 7), 123 Fed. (2d) 594.

NOTES TO DECISIONS

Remedies.

In an action for declaratory judgment for cancelation of fire insurance for breach of policies, defendant's right, if any, to recover under the policies is a compulsory counterclaim, and unless pleaded in the answer, is waived. *Home Ins. Co. v. Trotter* (C. C. A. 8), 130 Fed. (2d) 800.

The existence of other remedies does not preclude judgment for declaratory relief. *Abood v. Beldoch-Popper, Inc.* (D. C.-N. Y.), 45 Fed. Supp. 679; *Firemen's Fund Ins. Co. v. Crandall Horse Co.* (D. C.-N. Y.), 47 Fed. Supp. 78.

In an action for a declaratory judgment voiding fire insurance policy, a motion to enjoin defendant from suing

plaintiff and others in state courts upon the same insurance policy will not be granted. *Firemen's Fund Ins. Co. v. Crandall Horse Co.* (D. C.-N. Y.), 47 Fed. Supp. 78.

Right to Jury.

In an action by insurer for a declaratory judgment against insured and the injured person, insurer's motion to strike demand for jury trial was granted as to the equitable issues, as was his motion for severance of legal and equitable issues. Questions triable by jury in an action for money damages are also triable by jury in a declaratory judgment action. *United States Fid. & Guar. Co. v. Janich* (D. C.-Cal.), 3 Fed. R. Dec. 16.

96A. Complaint Under Federal Tort Claims Act.

United States District Court

District of _____

John Doe,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. _____

Complaint.

1. The action is brought under the Federal Tort Claims Act, approved August 2, 1946, Title IV, Public Law 601, 79th Congress, (U.S.C., Title____, Section____), as hereinafter more fully appears.

2. Plaintiff is a resident of _____, which is in the _____ District of _____.

3. On _____, 19____, plaintiff was driving his automobile on a public highway near the intersection of _____ and _____ streets in the City of _____, _____ when it was struck by a truck owned by the United States and then and there negligently operated by A. B., a chauffeur employed by (name of Federal Agency), who was then acting within the scope of his employment. [Plaintiff was exercising due care and was free from contributory negligence.]

4. As the result of said collision plaintiff's automobile was turned over and damaged and plaintiff was severely injured.

Wherefore, plaintiff demands judgment against the defendant in the sum of _____ dollars (\$_____).

Attorney for plaintiff.

Address.

Note.

For necessity of pleading freedom from contributory negligence see note to Form 85A.

96B. Complaint Under Federal Tort Claims Act.

United States District Court

_____ District of _____

A. B.,

Plaintiff,

v.

United States of America,

Defendant.

Civil No. _____

Complaint.

1. The action is brought under the Federal Tort Claims Act, approved August 2, 1946, Title IV, Public Law 601, 79th Congress, (U.S.C., Title _____, Section _____), as hereinafter more fully appears.

2. Plaintiff is a resident of _____, which is in the _____ District of _____.

3. On _____, 19____, at about the hour of _____ o'clock P.M., plaintiff was a pedestrian crossing the intersection, on the regular pedestrian crosswalk, on the south side of the intersection of _____ and _____ streets, in the City of _____, _____ and that at said time and place one John Doe, an employee of the Post Office Department of the United States of America, was then and there driving an automobile of the Post Office Department, in the regular course of his employment and acting as the agent and servant of the said Post Office Department, in a northerly direction on _____ street at its intersection with _____ street, and that at said time and place the said John Doe did then and there negligently operate said automobile so as to cause the same to collide with the person of the plaintiff, thereby throwing the plaintiff to the pavement and greatly injuring her.

4. By reason of the negligence of the said John Doe, plaintiff was injured as follows: Fracture of the right leg; fracture of the pelvis; numerous bruises and contusions in and about her body; all of which have injured her in health, strength and activity and caused her to undergo great mental

and physical pain and suffering all to her damage in the sum of _____ dollars (\$_____). As a result of the injury, plaintiff has incurred expenses for hospital, medical, and nursing treatment in the total sum of _____ dollars (\$_____), and suffered damage to her clothes in the sum of _____ dollars (\$_____).

Wherefore, plaintiff prays judgment against the defendant in the sum of _____ dollars (\$_____), and for such other and further relief as to the court seems just.

Attorney for plaintiff.

Address.

103A. Complaint for Triple Damages under Antitrust Laws.

(Caption.)

1. This action arises under the Act of July 2, 1890 and the Act of October 15, 1914 (U. S. C., Title 15, §§ 1, 15).

2. The defendant, AB Co., is a corporation organized and existing under the laws of the state of _____. The defendant, CD Co. is a corporation organized and existing under the laws of the state of _____.

3. The plaintiff is engaged in the business of growing strawberries and selling them in interstate commerce. The defendants are owners and operators of chains of food stores, comprising more than _____ stores in more than _____ states.

4. During the years _____ and _____, the defendants purchased more than _____ per cent (—%) of the strawberries produced by the plaintiff and other growers of strawberries.

5. During the aforesaid years, defendants entered into a conspiracy in restraint of trade and commerce among the several states to monopolize a part of trade and commerce among the several states, to wit, the retail distribution of strawberries and other food products throughout the United States, and to stifle competition therein.

6. In the prosecution of this conspiracy the defendants agreed with each other to control the price of strawberries by driving competing purchasers out of the market.

7. To that end the defendants through their retail stores throughout the United States sold strawberries produced by plaintiff and other growers as "loss leaders" at prices at retail less than cost, with the intention and result of enabling them to dictate the price paid by them for strawberries produced by the plaintiff and other growers and also the price to the ultimate consumer and to force out of business other retail dealers in competition with defendants' stores. As a result of this concerted action of the defendants, other purchasers of strawberries, who were unable to resell them at retail at prices that would meet the unfair and lawful prices below cost at which the defendants sold strawberries in

their retail stores in competition with such other purchasers, were driven out of the strawberry market. Thereby competition in interstate commerce in strawberries was destroyed and a monopoly was created in the strawberry market in favor of the defendants. This concerted action on the part of the defendants resulted in the depreciation of prices in the market in strawberries in —, the limitation of competition in strawberries in interstate commerce, and the establishment of a monopolistic control over interstate commerce in strawberries in the hands of the defendants.

8. The said illegal combination and conspiracy and their operation depreciated the average price of strawberries shipped during the years — and — in interstate commerce by plaintiff and other growers from — dollars (\$—) per crate to — dollars (\$—) per crate, causing a loss to the plaintiff on — crates shipped by him in interstate commerce in the sum of — dollars (\$—).

Wherefore, the plaintiff demands judgment against the defendant for triple damages in the sum of — dollars (\$—), with interest, costs, and attorney's fees.

Attorney for plaintiff.

Address.

Source of Form.

Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. (C. C. A. 8), 131 Fed. (2d) 419.

NOTES TO DECISIONS

Allegations of Fraud.

Averments that one defendant fraudulently made up inflated invoices with the knowledge that they would be used by the other defendants who were engaged in the purchase of machinery from the first defendant for the plaintiff, and setting out the time and place of the transaction, are sufficient to state a claim for relief. *Callinan v. Federal Cash Register Co.* (D. C.-Mo.), 162 Bull. 8, 3 Fed. R. Dec. 177.

Antitrust Laws.

In an antitrust case to recover threefold damages in which plaintiff, the assignee of over eight thousand claims, failed to specify damages, a motion to dismiss for insufficiency should be denied, and plaintiff required to state damages with respect to each assignor by amendment. A short and plain statement of the cause of action alleging ultimate facts constituting the violation of law is sufficient, and it is not necessary to set out detailed acts nor the circumstances that caused damage. *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co.* (C. C.

A. 8), 131 Fed. (2d) 419, revg. 40 Fed. Supp. 897.

In an action for damages under the Antitrust Act, the complaint should state in general terms the nature of the agreement and what was done that injured plaintiffs. A complaint alleging a combination in restraint of trade which is merely a copy of the indictment in a criminal case is insufficient. *Emich Motor Corp. v. General Motors Corp.* (D. C.-Ill.), 2 Fed. R. Dec. 552.

Corporations.

A cooperative corporation suing for damages on behalf of its members is not entitled to recover upon its own cause of action after a ruling that it could not maintain the action for its members, if the complaint fails to state any facts upon which relief could be granted to the corporation. *Farmers Coop. Oil Co. v. Socony-Vacuum Oil Co., Inc.* (C. C. A. 8), 133 Fed. (2d) 101.

Form of Complaint.

A motion to dismiss for insufficiency should not be granted if the complaint states a cause of action even though it

appears improbable that the plaintiff can establish the allegations of the complaint. *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co.* (C. C. A. 8), 131 Fed. (2d) 419, rev'g. 40 Fed. Supp. 897.

Where suits are instituted under anti-trust act especially where they involve large sums of money and will in all probability consume the time of the court and counsel for a long period, courts generally recognize the desirability, if not the necessity, of requiring the pleader to establish in the complaint a statement of sufficient facts regarding the causal connection between the wrong and the damages, so as to enable defendant to be apprised of the legal theory which will be urged at the trial of the case and thus be able to frame responsive pleadings thereto. *Twin Ports Oil Co. v. Pure Oil Co.* (D. C.-Minn.), 46 Fed. Supp. 149.

A complaint, in an action for treble damages which alleged that defendant was the maker of a particular type of brick, which because of its superior qualities, design, and color was in great demand in the building industry and was required in the major portion of the building contracts in the named area, that defendant controls the sale and distribution of such brick and sells to one of the other defendants in said area but refuses to sell it to plaintiff with the purpose of lessening competition and creating a monopoly therein did not set forth a violation of the Robinson-Patman amendment. *Sorrentino v. Glen-Gery Shale Brick Corp.* (D. C.-Pa.), 46 Fed. Supp. 709.

Where pleading alleged that glassware manufacturer as a direct and proximate consequence of conspiracy to monopolize and restrain trade and commerce in the glassware industry had been directly injured in his property and business, having been required to pay exorbitant and oppressive royalties and having been prevented and restrained from undertaking or continuing the manufacture and sale of various lines of glassware that would have resulted in substantial profit, it sufficiently showed damage resulting proximately from a breach of the anti-trust laws for the purpose of stating a cause of action for the recovery of treble damages. *Hartford-Empire Co. v. Glenshaw Glass Co.* (D. C.-Pa.), 47 Fed. Supp. 711.

General allegations that a conspiracy in restraint of trade directly injured the business and property of the complaining party are sufficient. *Hartford-Empire Co. v. Glenshaw Glass Co.* (D. C.-Pa.), 47 Fed. Supp. 711.

Complaint need not negative exceptions made by the statute. *Weinberg v. Sinclair Refining Co.* (D. C.-N. Y.), 48 Fed. Supp. 203.

Where complaint alleged diversity of citizenship, price discrimination in sales of gasoline in interstate commerce, illegal rebates, discounts, terms, allowances, and other preferences which resulted in substantial damage to plaintiffs, it sufficiently stated a cause of action within the jurisdiction of a federal court. *Weinberg v. Sinclair Refining Co.* (D. C.-N. Y.), 48 Fed. Supp. 203.

105. Complaint in Stockholders' Representative Suit in Behalf of Corporation.

Note of Advisory Committee to Rule 23 (b):

"Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in such an action the complainant 'shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. * * *'

"As a result of the decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64, 58 S. Ct. 817 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co. v. Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a share-

holder to maintain such actions, although not a shareholder at the time of the transactions complained of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

"The rule has a long history. In *Hawes v. Oakland*, 1882, 104 U. S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift v. Tyson*, 1842, 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co. v. Tompkins* in 1938, concerned

with the question whether Hawes v. Oakland dealt with substantive right or procedure.

"Following the decision in Hawes v. Oakland, and at the same term, the Court, to implement its decision, adopted Equity Rule 94, which contained the same provision above quoted from Rule 23 F. R. C. P. The provision in Equity Rule 94 was later embodied in Equity Rule 27, of which the present Rule 23 is substantially a copy.

"In *City of Quincy v. Steel*, 1887, 120 U. S. 241, 245, 7 S. Ct. 520, the Court referring to Hawes v. Oakland said: 'In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States.'

"Some other cases dealing with Equity Rules 94 or 27 prior to the decision in *Erie R. Co. v. Tompkins* are *Dimpfel v. Ohio & Miss. R. R.*, 1884, 110 U. S. 209, 3 S. Ct. 573; *Illinois Central R. Co. v. Adams*, 1901, 180 U. S. 28, 34, 21 S. Ct. 251; *Venner v. Great Northern Ry.*, 1908, 209 U. S. 24, 30, 28 S. Ct. 328; *Jacobson v. General Motors Corp.*, S. D. N. Y. 1938, 22 Fed. Supp. 255, 257. These cases generally treat Hawes v. Oakland as establishing a "principle" of equity, or as dealing not with jurisdiction but with the 'right' to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no 'title' and results in a dismissal 'for want of equity.'

"Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz v. Gould*, 1911, 202 N. Y. 11, 94 N. E. 1088.

"The first case arising after the decision in *Erie R. Co. v. Tompkins*, in which this problem was involved, was *Summers v. Hearst*, S. D. N. Y. 1938, 23 Fed. Supp. 986. It concerned Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: 'The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law.' He quoted *Pollitz v. Gould*, 1911, 202 N. Y. 11, 94 N. E. 1088, as saying that the United States Supreme Court 'seems to have been more concerned with establishing this rule as one of practice than of substantive law' but that 'whether it be regarded as es-

tablishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts.'

"He then concluded that, although the federal decisions treat the equity rule as 'stating a principle of substantive law,' if 'Equity Rule 27 is to be modified or revoked in view of *Erie R. Co. v. Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule.'

Some other federal decisions since 1938 touch the question.

"In *Picard v. Sperry Corporation*, S. D. N. Y. 1941, 36 Fed. Supp. 1006, 1009-10, affirmed without opinion, C. C. A. 2d, 1941, 120 F. 2d 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23 (b) was 'a matter of practice,' not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co. v. Tompkins*. In *York v. Guaranty Trust Co. of New York*, C. C. A. 2d, 1944, 143 F. 2d 503, rev'd on other grounds, 1945, 65 S. Ct. 1464, the court said: 'Restrictions on the bringing of stockholders' actions, such as those imposed by F. R. C. P. 23(b) or other state statutes are procedural,' citing the *Picard* and other cases.

"In *Gallup v. Caldwell*, C. C. A. 3d, 1941, 120 F. 2d 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23(b), and that 'under the circumstances the proper course was to follow Rule 23(b).'

"In *Mullins v. DeSoto Securities Co.*, W. D. La. 1942, 45 Fed. Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23(b).

"In *Toebelman v. Missouri-Kansas Pipe Line Co.*, D. Del. 1941, 41 Fed. Supp. 334, 340, the court dealt only with another part of Rule 23(b), relating to prior demands on the stockholders and did not discuss *Erie R. Co. v. Tompkins* or its effect on the rule.

"In *Perrott v. United States Banking Corp.*, D. Del. 1944, 53 Fed. Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23(b), after discussion of the authorities, saying:

'It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff can not qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court.'

"In *Bankers Nat. Corp. v. Barr*, S. D. N. Y. 1945, 9 Fed. Rules Serv. 23b. 11, Case 1, the court held Rule 23(b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

"The New York rule, as stated in *Pollitz v. Gould*, supra, has been altered by an act of the New York Legislature, Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61, which provides that 'in any action brought by a shareholder in the right of a * * * corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law.' At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61-b.) These provisions are aimed at so-called 'strike' stockholders' suits and their attendant abuses. *Shielcrawt v. Moffett*, Ct. App. 1945, 294 N. Y. 180, 61 N. E. (2d) 435, rev'g 51 N. Y. S. (2d) 188, aff'g 49 N. Y. S. (2d) 64; *Noel Associates, Inc. v. Merrill*, Sup. Ct. 1944, 184 Misc. 646, 63 N. Y. S. (2d) 143.

"Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum v. Clinton Trust Co.*, Sup. Ct. 1944, 183 Misc. 340, 48 N. Y. S. (2d) 267; *Noel Associates, Inc. v. Merrill*, supra. In the latter case the court pointed out that 'The 1944 amendment to Section 61 rejected the rule laid down in the *Pollitz* case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23(b). * * * There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum v. Clinton Trust Co.*, supra (applicable); *Noel Associates, Inc. v. Merrill*, supra (inapplicable).

"With respect to § 61-b, which may be regarded as a separate problem, *Noel*

Associates, Inc. v. Merrill, supra, it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt v. Moffett*, supra. As to actions instituted after the effective date of the legislation, the constitutionality of § 61-b is in dispute. See *Wolf v. Atkinson*, Sup. Ct. 1944, 182 Misc. 675, 49 N. Y. S. (2d) 703 (constitutional); *Citron v. Mangel Stores Corp.*, Sup. Ct. 1944, 50 N. Y. S. (2d) 416 (unconstitutional); *Zlinkoff, The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 1945, 54 Yale L. J. 352.

"New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch. 131, R. S. Cum. Supp. 14:3-15. The New Jersey provision similar to Chapter 668, § 61-b, differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt v. Moffett*, Sup. Ct. N. Y. 1945, 184 Misc. 1074, 56 N. Y. S. (2d) 134.

"See also generally, 2 *Moore's Federal Practice*, 1938, 2250-2253, and Cum. Supplement § 23.05.

"The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23(b) (1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court ex parte, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23(b) would be that the question is postponed to await a litigated case.

"The Advisory Committee is unanimously of the opinion that this course should be followed.

"If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23(b) (1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains."

105A. Complaint in True Class Suit—Trust Estate.

(Caption.)

1. Plaintiff is a citizen of the state of —, and the defendant is a corporation incorporated under the laws of the state of —. The amount in controversy exceeds, exclusive of interest and costs, the sum of — dollars (\$—).

2. The plaintiff is a beneficiary of the trust hereinafter referred to, and brings this suit as a class action in behalf of himself and all other beneficiaries of said trust similarly situated. The class consists of approximately — members, who are so numerous that it is impracticable to bring them before the court. The character of the right sought to be enforced in behalf of the class is joint or common.

3. The defendant is a trustee of a fund of which the plaintiff and other members of the trust are beneficiaries [here set forth the origin and nature of trust, document creating it, and the interest of the plaintiff and other members of the class].

4. The defendant has been guilty of malfeasance, has wrongfully converted trust funds to its own use and fraudulently paid excessive commissions to various individuals, as follows: [Here set forth details].

5. The trust fund originally consisted of property worth approximately the sum of — dollars (\$—) and the amounts wrongfully diverted by the defendant as aforesaid aggregate the sum of — dollars (\$—).

Wherefore, the plaintiff demands judgment against the defendant as follows:

1. Enjoining and restraining the defendant from further dissipation and diversion of the assets of said trust fund.

2. Directing an accounting to determine the amount due from the defendant to said trust fund and the restoration of such amount to the trust fund.

3. Appointing a receiver to take possession of, hold and administer said trust fund.

Attorney for plaintiff.

Address.

Source of Form.

Boesenberg v. Chicago Title & Trust Co. (C. C. A. 7), 128 Fed. (2d) 245, 141 A. L. R. 565.

Cross-Reference.

Motion to dismiss class suit, see Form 232.

NOTES TO DECISIONS**Class Actions in General.**

The first clause of Rule 23 of the Rules of Civil Procedure [23 (a) (1)], is the case of a joint, common, or derivative right. The second clause [23 (a) (2)], deals with the adjudication of claims to property. The third clause [23 (a) (3)], is sometimes referred to as the spurious class suit, and is only a limited form of

general joinder. To use terms sometimes applied, one is the true class suit; two is the hybrid class suit; and three is the so-called spurious class suit. The first two are really the proper cases of class suits, where the suing by the representative really should be binding and res adjudicata on those who are represented. In (3) it is not binding and is

merely a short cut to cases where joinder is permissive. *Farmers Coop. Co. v. Socony-Vacuum Oil Co.* (C. C. A. 8), 133 Fed. (2d) 101.

Where the causes of action are several and common relief is not sought, a class action can not be maintained. *Farmers Coop. Co. v. Socony-Vacuum Oil Co.* (C. C. A. 8), 133 Fed. (2d) 101.

Damages.

Class action may be maintained to recover triple damages under the anti-trust laws. *Weeks v. Bareco Co.* (C. C. A. 7), 125 Fed. (2d) 84.

Dismissal or Compromise.

Rule 23(c), which prohibits dismissal of class actions without notice to members of the class was intended to prevent a plaintiff from securing benefits on dismissal without first giving notice to all other members of the class. *Partridge v. St. Louis Joint Stock Land Bank* (C. C. A. 8), 130 Fed. (2d) 281.

A class action may be dismissed on order of the court for want of prosecution without notice to members of the class if the court finds that there has been unreasonable delay on the part of the plaintiff in preparing for trial. *Partridge v. St. Louis Joint Stock Land Bank* (C. C. A. 8), 130 Fed. (2d) 281.

After judicial machinery is set in motion by instituting a stockholder's derivative action, the control of the litigation is with the court and not with the plaintiff, and the action can not be dismissed or compromised without the approval of the court. *Denicke v. Anglo California Nat. Bank* (D. C.-Cal.), 45 Fed. Supp. 524.

In a stockholder's derivative action against former officers of a bank, the officers of the defendant bank may adopt a resolution accepting, an offer of compromise, subject, however, to the approval of the court. *Denicke v. Anglo California Nat. Bank* (D. C.-Cal.), 45 Fed. Supp. 524.

Application for leave to intervene in a class action filed after the action has been dismissed and while a motion for rehearing is pending is not timely, especially if the motion for a rehearing is to be denied. *Mullins v. De Soto Secur. Co., Inc.* (D. C.-La.), 45 Fed. Supp. 871.

In an action for rescission by a purchaser of securities on behalf of all persons similarly situated, defendants' motion to dismiss as to any other persons except plaintiff should be denied as it would have the effect of excluding bondholders who later had filed motion to intervene. *Hunter v. Southern Indem. Underwriters, Inc.* (D. C.-Ky.), 47 Fed. Supp. 242.

Notice of proposed dismissal need not be given to each shareholder where it appears that dismissal of such class action is based on merits of case rather than by agreement. *Smith v. Industrial Secur. Corp.* (D. C.-Conn.), 49 Fed. Supp. 959.

The rule that a plaintiff may continue, compromise, abandon, or discontinue a class action unless and until a person similarly situated is made a party to the action or until an interlocutory judgment or decree is entered was not modified by the Rules of Civil Procedure except in so far as Rule 23 (c) requires the approval of the court before dismissal may be had. *Albrecht v. Bauman*, 76 App. D. C. 189, 130 Fed. (2d) 452.

Jurisdiction.

In a true class suit involving a joint or common right, the jurisdictional amount is the total amount claimed in behalf of the class. *Grand Rapids Furn. Co. v. Grand Rapids Furn. Co.* (C. C. A. 7), 127 Fed. (2d) 245; *Boesenberg v. Chicago Title & Trust Co.* (C. C. A. 7), 123 Fed. (2d) 245.

When general jurisdiction is conferred by a federal statute, those who have a common interest in the questions of law or fact involved may participate in the action without independent grounds of jurisdiction. An intervenor, whose only interest is a common question of law or fact, must show independent grounds of jurisdiction. *Hunter v. Southern Indem. Underwriters, Inc.* (D. C.-Ky.), 47 Fed. Supp. 242.

Secondary Action by Stockholders.

In a secondary action by shareholders a party attempting to intervene must show an independent demand upon the management of the organization in which he is a shareholder to enforce the rights in question to the same extent as if the intervention was an independent suit. *Mullins v. De Soto Secur. Co., Inc.* (D. C.-La.), 45 Fed. Supp. 871.

In order to permit a shareholder to conduct litigation on behalf of a corporation, he must show to the satisfaction of the court that he has exhausted all means within his reach to obtain redress or action through the corporation. *Maxwell v. Enterprise Wall Paper Mfg. Co.* (D. C.-Pa.), 47 Fed. Supp. 999.

Rule 23 (b), does not abridge, enlarge, or modify the substantive rights of any litigant nor may it be construed to abridge, modify or otherwise limit the rights of the corporation or stockholder beneficiaries in a derivative action. *Overfield v. Pennroad Corp.* (D. C.-Pa.), 48 Fed. Supp. 1008.

A complaint in a secondary action by a shareholder must state that the action is

not collusive in order to confer jurisdiction, that efforts have been made to secure the action desired from the management of the company and the shareholders, and the reasons for failure to obtain the action or the reasons for not making such effort. Ownership of stock at the time of the transaction complained of must be shown. A complaint setting forth a hazy mass of conclusions without statements of facts showing that the pleader is entitled to relief does not meet the requirements of the Rules of Civil Procedure. *Toomey v. Wickwire Spencer Steel Co.* (D. C.-N. Y.), 163 Bull. 35.

Who May Sue.

A cooperative corporation may not bring a class action for damages on behalf of its members if the damages sustained by plaintiff are different from those suffered by its members, since common relief is not sought. *Farmers Coop. Oil Co. v. Socony-Vacuum Oil Co., Inc.* (C. C. A. 8), 133 Fed. (2d) 101.

The dismissal of a secondary action brought by a shareholder who acquired stock after the alleged wrongs were committed will not prejudice other shareholders who acquired their stock at an earlier date and who are therefore of

another class. *Mullins v. De Soto Secur. Co., Inc.* (D. C.-La.), 45 Fed. Supp. 871.

Employees described as elevator operators and janitors can not bring a class action to recover overtime compensation under the Fair Labor Standards Act (9 F. C. A., Title 29, § 201 et seq.; U. S. C. A., Title 29, § 201 et seq.; id. U. S. C.) for themselves and others employed as window washers, scrub women, and maintenance men since the character of the right sought to be enforced is neither joint, common, nor secondary, no specific property is involved, nor is there a common question of law or fact, nor a common relief sought. Employees similarly situated may join their actions to recover overtime compensation under the Fair Labor Standards Act and the Rules of Civil Procedure. *Lofther v. First Nat. Bank* (D. C. Ill.), 45 Fed. Supp. 986.

A trade association may bring a class action for itself and its members if the members have designated the association to represent them and the association has succeeded to the rights of some of its individual members. *National Hairdressers' & Cosmetologists' Assn., Inc. v. Philad. Co.* (D. C.-Del.), 3 Fed. R. Dec. 199.

105B. Complaint in Spurious Class Action—Validity of Reissued Patent.

(Caption.)

1. Allegation of jurisdiction.
2. The plaintiff is engaged in the business of conducting a hairdressing shop and beauty parlor and uses a certain hair waving process, known as [here insert]. He brings this suit as a class action in behalf of himself and all other persons engaged in the said business and using the aforesaid process. The class consists of approximately — members, who are so numerous that it is impracticable to bring them before the court. There are common questions of law and fact affecting the rights of the parties constituting the class and common relief is sought.
3. On information and belief, the defendant is the owner of letters patent of the United States No. —, issued on — —, 19—, to —, on “—.”
4. The defendant has charged the plaintiff and all other members of the class with infringing the said letters patent.
5. The plaintiff asserts that said letters patent are invalid on the following grounds: [Here insert].
6. The plaintiff denies that he or any other member of the class infringe said letters patent.

Wherefore, the plaintiff demands a declaratory judgment that said letters patent are invalid and that the plaintiff and other members of the

class are not infringing said letters patent, and judgment permanently enjoining the defendant from bringing or maintaining any action against the plaintiff or any other member of the class alleging infringement of said letters patent, together with the costs of this action.

Attorney for plaintiff.

Address.

Source of Form.

National Hairdressers' & Cosmetologists' Assn., Inc. v. Philad. Co. (D. C.

Del.), 41 Fed. Supp. 701. Compare with Farmers Coop. Co. v. Socony-Vacuum Oil Co. (C. C. A. 8), 133 Fed. (2d) 101.

NOTES TO DECISIONS

Who May Sue.

A cooperative corporation, in attempting to sue for damages on behalf of its members, should proceed under Rule 20(a), which provides for permissive joinder, since common relief is not sought and therefore a class action can not be maintained. Farmers Coop. Oil Co. v. Socony-Vacuum Oil Co., Inc. (C. C. A. 8), 133 Fed. (2d) 101.

A member of a class may maintain a class action for a declaratory judgment for himself and other members of his trade association charged with patent infringement even though the class will not be limited until a final decree is entered. National Hairdressers' & Cosmetologists' Assn., Inc. v. Philad. Co. (D. C.-Del.), 164 Bull. 53, 3 Fed. R. Dec. 199.

105C. Complaint in Spurious Class Action—Fraudulent Sale of Stock.

(Caption.)

1. This action arises under the Securities Act of 1933 (U. S. C., Title 15, § 77a et seq.).
2. The plaintiff is the owner of ——— certificates issued by the defendant and brings this suit as a class action in behalf of himself and all other owners of said certificates. The class consists of approximately ——— members, who are so numerous that it is impracticable to bring them before the court. There are common questions of law and fact affecting the rights of the parties constituting the class and common relief is sought.
3. The defendant is a corporation organized and existing under the laws of the state of ———.
4. On or about ———, 19——, the defendant issued a prospectus in which it offered for sale the aforesaid certificates. The said prospectus contained an untrue statement of a material fact, to wit: [Here insert], whereas, in truth and in fact [here insert].
5. The defendant circulated copies of said prospectus by use of the mails and instruments of transportation in interstate commerce among numerous persons, including the plaintiff and all other members of the class.
6. By the use of the mails and instruments of transportation in interstate commerce, the defendant, by means of the aforesaid prospectus, sold to the plaintiff and other members of the class, and in reliance on the

prospectus and on the aforesaid untrue statement, the plaintiff and other members of the class purchased from the defendant, a large number of said certificates. On or about ———, 19—, the plaintiff paid to the defendant the sum of ——— dollars (\$——), as consideration for said certificates.

7. At the time of said purchases, the plaintiff and, on information and belief, the other members of the class, did not know that the aforesaid statement contained in said prospectus was untrue, which materially affected the value of said certificates.

8. The plaintiff has tendered the aforesaid certificates to the defendant and has demanded a return of the consideration paid by the plaintiff therefor, but the defendant refused to accept the tender or return the consideration.

Wherefore, the plaintiff demands judgment against the defendant for the sum of ——— dollars (\$——), with interest from ———, 19—, and costs; and that other members of the class who come in and prove their claims have judgment against the defendant for the consideration paid by them on the purchase of the said certificates, with interest and costs.

Attorney for plaintiff.

Address.

Source of Form.

Independence Shares Corp. v. Deckert
(C. C. A. 3), 123 Fed. (2d) 979.

NOTES TO DECISIONS

Form of Complaint.

The burden is upon plaintiffs, who undertake to sue in behalf of a class, to allege in their complaint and, in conformity with the allegations, to prove (or possibly, in the alternative, to show by independent evidence) that the court's recognition of them in the representative capacity they assume will "insure the adequate representation" of all within the class. *Oppenheimer v. F. J. Young & Co.* (D. C.-N. Y.), 3 Fed. R. Dec. 220.

Jurisdiction.

In a spurious or hybrid class suit, where the rights of the members are several, the claim of each plaintiff must satisfy the requirement as to the jurisdictional amount and the claims may not be aggregated for that purpose. *Black & Yates, Inc. v. Mahogany Assn., Inc.* (C. C. A. 3), 129 Fed. (2d) 227.

When general jurisdiction is conferred by a federal statute, those who have a common interest in the questions of law or fact involved may participate in the action without independent grounds of

jurisdiction. An intervenor whose only interest is a common question of law or fact must show independent grounds of jurisdiction. *Hunter v. Southern Indem. Underwriters, Inc.* (D. C.-Ky.), 47 Fed. Supp. 242.

Nature of Spurious Class Action.

In an action based on a federal statute, resort to the spurious class action device to facilitate intervention is unnecessary. A spurious class action is merely a joinder device which permits persons who have a common interest in the questions of law and fact involved, to participate without showing independent grounds of jurisdiction. In a spurious class action in which the only common interest is in some question of law or fact involved, a judgment affects the rights only of those who become participants in the litigation. *Hunter v. Southern Indem. Underwriters, Inc.* (D. C.-Ky.), 47 Fed. Supp. 242.

Parties.

Complaint in class action must state number of persons constituting class and that they are so numerous as to make it impracticable to bring them before the court. *Johnson v. Riverland Levee Dist.* (C. C. A. 8), 117 Fed. (2d) 711, 134 A. L. R. 326.

Plaintiffs in class action must fairly insure adequate representation of all members of the class. *Independence Shares Corp. v. Deckert* (C. C. A. 3), 123 Fed. (2d) 979.

Right of Intervenor.

In an action by the securities and exchange commission to liquidate and terminate a utility corporation, a preferred stockholder was allowed to intervene for herself and her class, since the management were nominees of the common stockholders and had no equity in the assets of the corporation, and the preferred stockholders should be represented and protected. *In re Securities & Exch. Comm.* (D. C.-Del.), 164 Bull. 56.

105D. Complaint for Libel.

(Caption.)

1. Allegation of jurisdiction.

2. The defendant, at all times hereinafter mentioned, was engaged in the business of publishing, distributing, and selling books.

3. On or about ———, 19—, the defendant published a book written by one AB, and entitled “——.” In said book, which had a large circulation and was purchased and read by numerous persons, the defendant maliciously published the following false and defamatory matter of and concerning the plaintiff: [Here quote defamatory matter].

4. By virtue of the premises the plaintiff has been damaged in the sum of ——— dollars (\$——).

Wherefore, plaintiff demands judgment against the defendant for the sum of ——— dollars (\$——), with costs.

Attorney for plaintiff.

Address.

Note.

See *Love v. Commercial Cas. Ins. Co.* (D. C.-Miss.), 26 Fed. Supp. 481.

106. Complaint to Annul a Contract for Fraud.**NOTES TO DECISIONS****Averments of Fraud or Condition of the Mind.**

In an action to recover for the loss of gold certificates from a safe deposit box, a defense that the claim for the alleged loss and disappearance of the gold certificates is fraudulent and without foundation in fact, and is based on a conspiracy between the plaintiff and certain witnesses, without specification of circumstances and averment of fact, is in-

sufficient. Averments of fraud must state with particularity the circumstances constituting the fraud. *Aetna Cas. & Surety Co. v. Abbott* (C. C. A. 4), 130 Fed. (2d) 40, affg. 42 Fed. Supp. 793.

“The circumstances constituting fraud” mean the time, place and content of the false representation. *United States v. Hartmann* (D. C.-Pa.), 2 Fed. R. Dec. 477.

118. Complaint under Fair Labor Standards Act.

(Caption.)

1. This action arises under the Fair Labor Standards Act, as amended (Act of June 25, 1938, 52 Stat. 1060; U. S. C., Title 29, § 201 et seq.) and

is brought by the plaintiff in behalf of himself and other employees of the defendant similarly situated.

2. At all times hereinafter mentioned the defendant was and now is engaged in interstate commerce, to wit: [Here specify nature of business and allege facts indicating that the business constitutes interstate commerce].

3. Between — —, 19—, and — —, 19—, the defendant employed plaintiff and other employees as —, in the aforesaid business. The services performed by plaintiff were a part of interstate commerce.

4. During the aforesaid period the defendant failed to compensate plaintiff and other employees for their services at the minimum rate required by law, but on the contrary paid him and them compensation at a lower rate than provided by law.

5. During the aforesaid period, the defendant required the plaintiff and other employees to work in excess of forty hours per week, to wit — hours a week, but failed to compensate them for such excess at a rate equaling one and one-half times the regular rate.

Wherefore, the plaintiff demands judgment against defendant for the sum of — dollars (\$—), and for the sum of — dollars (\$—) as liquidated damages and for attorney's fees and costs; and that all other employees of defendant similarly situated have judgment for such sums as may be found due them.

Attorney for plaintiff.

Address.

Statutory Reference.

See Fair Labor Standards Act of 1938,
§ 16 (b), 9 F. C. A., Title 29, § 216 (b);

U. S. C. A., Title 29, § 216 (b); id.
U. S. C.

119. Complaint under Emergency Price Control Act.

(Caption.)

1. This action arises under the Emergency Price Control Act of 1942, as amended (Act of January 30, 1942, as amended, 56 Stat. 23, 767; U. S. C., Title 50, § 901 et seq., 11 F. C. A., Title 50, Appxs. 25, 43).

2. On or about — —, 19—, the price administrator established by regulation the maximum price for — at — dollars (\$—).

3. On or about — —, 19—, while the said maximum price was in effect, the defendant sold to the plaintiff, other than in the course of plaintiff's trade or business, — for a consideration of — dollars (\$—).

Wherefore, the plaintiff demands judgment against the defendant for treble the amount by which the consideration exceeded the applicable

maximum price, to wit, the sum of — dollars (\$—), with reasonable attorney's fees and costs.

Attorney for plaintiff.

Address.

119A. Complaint for Relief in the Nature of Mandamus.

United States District Court
For the District of Columbia

AB,

Plaintiff,

v.

CD, as Administrator of
Veterans' Affairs, and
EF, as Comptroller General of
the United States,

Defendants.

The plaintiff, for his complaint, alleges:

1. At all times hereinafter mentioned the defendant CD was and now is Administrator of Veterans' Affairs and the defendant EF was and now is Comptroller General of the United States. Each of said defendants is a resident of the District of Columbia.

2. On or about — —, 19—, in the District Court of the United States for — District, in an action entitled, "AB, plaintiff v. United States of America, defendant," the plaintiff recovered judgment against the United States of America for the sum of — dollars (\$—), on a policy of life insurance theretofore issued to the plaintiff by the United States.

3. The plaintiff thereafter made demand upon the defendant CD as Administrator of Veterans' Affairs for the payment of said judgment and that he make an appropriate award for that purpose, but said demand was refused and said judgment has not been paid. On information and belief, the reason why the defendant CD has refused to comply with said demand is that the defendant EF as Comptroller General of the United States has unlawfully declined to certify a voucher for the payment of said judgment, alleging that the plaintiff is indebted to the United States in an amount greater than the amount of said judgment.

Wherefore, the plaintiff demands judgment against the defendants, directing defendant CD, as Administrator of Veterans' Affairs to make a proper award for the payment of the amount of the aforesaid judgment, and directing defendant EF as Comptroller General of the United States

to certify for payment to the treasury of the United States the sum due to the plaintiff under the aforesaid judgment.

Attorney for plaintiff.

Address.

Source of Form.

Hines v. United States ex rel. Marsh,
70 App. D. C. 206, 105 Fed. (2d) 85.

Note.

While the writ of mandamus in the District Courts has been abolished the same relief may be obtained by a civil action, Rule 81 (b), p. 939 of parent volume.

119B. Complaint by Employee to Review Order under Longshoremen's and Harbor Workers' Compensation Act.

United States District Court

____ District of _____

AB,

Plaintiff,

v.

CD, Deputy Commissioner,

— Compensation District,

Defendant.

The plaintiff, for his complaint, alleges:

1. This action arises under the Longshoremen's and Harbor Workers' Compensation Act (U. S. C., Title 33, § 901 et seq.).

2. At all times hereinafter mentioned the defendant CD was and now is Deputy Commissioner for the — Compensation District of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act.

3. On or about — —, 19—, XY Corporation, a corporation organized and existing under the laws of the state of —, was engaged in the business of [here state employer's business indicating it is within scope of the statute], at —.

4. On or about — —, 19—, the plaintiff was employed by said XY Corporation, at —, in the capacity of —. The plaintiff's duties in said employment were —.

5. In the course of his employment as aforesaid, plaintiff sustained a disability resulting from an injury which occurred on — —, 19—, upon the navigable waters of the United States at —, as follows: [Here insert.]

6. On — —, 19—, the plaintiff gave notice in writing to the defendant and to the XY Corporation of said injury. On — —, 19—, the plaintiff filed with the defendant a claim for compensation for said disability.

7. Thereafter proceedings on said claim were had before the defendant, and on — —, 19—, the defendant made an order, rejecting the claim on the following grounds: [Here insert].

8. The said order made by defendant was not in accordance with law, on the following grounds: [Here insert].

Wherefore, the plaintiff demands judgment against the defendant, setting aside the aforesaid order and for such other and further relief as may appear just.

Attorney for plaintiff.

Address.

Statutory Reference.

See 10 F. C. A., Title 33, § 921; U. S. C. A., Title 33, § 921; id. U. S. C.

119C. Complaint by Employer to Review Order under Longshoremen's and Harbor Workers' Compensation Act.

United States District Court

_____ District of _____

XY Corporation,

Plaintiff,

v.

CD, Deputy Commissioner,

— Compensation District,

Defendant.

The plaintiff, for his complaint, alleges:

1. This action arises under the Longshoremen's and Harbor Workers' Compensation Act (U. S. C., Title 33, § 901 et seq.).

2. At all times hereinafter mentioned the defendant CD was and now is deputy commissioner for the — Compensation District of the United States Employees' Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act.

3. At all times hereinafter mentioned the plaintiff XY Corporation was and now is a corporation organized and existing under the laws of the state of —, engaged in the business of —, at —.

4. On — —, 19—, one AB, was employed by the plaintiff at —, in the capacity of —. The duties of said AB as such employee were [here insert].

5. On information and belief, the said AB claims to have sustained disability alleged to have resulted from an injury which is said to have occurred on — —, 19—, on the navigable waters of the United States at —, in the course of his employment.

6. On — —, 19—, said AB filed a claim with the defendant for compensation for said disability.

7. Thereafter proceedings on said claim were had before the defendant, and on — —, 19—, the defendant made an order awarding compensa-

tion to plaintiff as follows: [Here insert]. A copy of said award is hereto annexed and marked "Exhibit A."

8. The said order made by defendant was not in accordance with law on the following grounds: [Here insert].

Wherefore, the plaintiff demands judgment against the defendant that the aforesaid order be set aside as not in accordance with law, that an interlocutory injunction issue during the pendency of this action enjoining and restraining the payments due under said order, and that plaintiff have such other and further relief as may appear just.

Attorney for plaintiff.

Address.

119D. Complaint for Reemployment under the Selective Training and Service Act.

(Caption.)

1. This action arises under the Selective Training and Service Act of 1940, as amended (Act of September 16, 1940, 54 Stat. 885, 50 U. S. C. App. 308).

2. At all times hereinafter mentioned the defendant was and now is the owner of a retail store handling coats, suits, dresses and evening wear for women, located at _____ in the city of _____.

3. Prior to _____, 19—, plaintiff was employed by the defendant at the said store in the capacity of _____. The duties of the plaintiff as such employee were _____ and his compensation was at the rate of _____ per ____.

4. On _____, 19—, plaintiff left said employment in order to enter service in the armed forces of the United States, from which he received an honorable discharge on _____, 19—.

5. On _____, 19—, said plaintiff applied to defendant for restoration to his former position or to a position of like seniority, status or pay.

6. Defendant has failed and refused to restore the plaintiff to such former position.

Wherefore, plaintiff demands judgment against the defendant directing the defendant to restore the plaintiff to his former position or to a position of like seniority, status or pay, for damages in the sum of _____ and for attorney's fees and costs.

Attorney for plaintiff.

Address.

CHAPTER 5—TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Form

146A. Order granting preliminary injunction.

146A. Order Granting Preliminary Injunction.

(Caption.)

This cause came on to be heard on plaintiff's motion for a preliminary injunction and upon consideration thereof and the pleadings and affidavits filed herein, the court makes the following findings of fact and conclusions of law:—

FINDINGS OF FACT

1. [Here insert].
2. [Here insert].
3. [Here insert].

CONCLUSIONS OF LAW

1. [Here insert].
2. [Here insert] and it is further

Ordered, that pending the final determination of this action or until the further order of this court, that the defendant —, his agents, servants, employees, attorneys, and all persons in active concert or participation with him be restrained and enjoined from [here insert (see Form 147, page 98 of parent volume)]; provided that plaintiff first give security in the sum of — dollars (\$—), in the form and manner required by law. or (alternative for preceding paragraph); and it is further

Ordered, that the restraining order made herein on — —, 19—, is hereby continued until the final determination of this action.

Date—.

United States district judge.

CHAPTER 8—REMOVAL of CAUSES

Note.

Sections 1441-1450 of Title 28, U. S. C., completely rewrote the procedure for removal of causes from state courts. The petition for removal is now filed

in the federal court instead of the state court. See Section 1446. Forms 191 through 193 in parent volume should be modified accordingly.

CHAPTER 9—DEFENDANT'S MOTIONS AND ANSWERS

Form

232. Motion to dismiss class suit.

Form

233. Motion to dismiss stockholder's action.

208. Motion to Strike.**Note.**

Amended Rule 12(f) provides that any insufficient defense may be ordered stricken from a pleading.

The advisory committee's note to the amended rule 12(f) read:

"This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart v. Remington-Rand, Inc.*, D. Conn. 1939, 31 Fed. Supp. 296; *Eastman Kodak Co. v. McAuley*, S. D. N. Y. 1941, 4 Fed. Rules Serv. 12f.21, Case 8, 2 F. R. D. 21; *Schenley Distillers Corp. v. Renken*, E. D. S. C. 1940, 34 Fed. Supp. 678; *Yale Transport Corp. v. Yellow*

Truck & Coach Mfg. Co., S. D. N. Y. 1944, 3 F. R. D. 440; *United States v. Turner Milk Co.*, N. D. Ill. 1941, 4 Fed. Rules Serv. 12b.51, Case 3, 1 F. R. D. 643; *Teiger v. Stephan Oderwald, Inc.*, S. D. N. Y. 1940, 31 Fed. Supp. 626; *Teplitsky v. Pennsylvania R. Co.*, N. D. Ill. 1941, 38 Fed. Supp. 535; *Gallagher v. Carroll*, E. D. N. Y. 1939, 27 Fed. Supp. 568; *United States v. Palmer*, S. D. N. Y. 1939, 28 Fed. Supp. 936. And see *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.*, S. D. N. Y. 1944, 58 Fed. Supp. 338; *Commentary, modes of Attacking Insufficient Defenses in the Answer*, 1939, 1 Fed. Rules Serv. 669, 1940, 2 Fed. Rules Serv. 640."

213. Motion for Bill of Particulars. [Obsolete]**214. Order for Bill of Particulars. [Obsolete]****Note.**

Forms 213 and 214 have been rendered obsolete by amendment to Rule 12(e) which abolished Bills of Particulars.

The advisory committee's note to the amended Rule 12(e) read:

"References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher v. Jones*, E. D. Ky. 1943, 7 Fed. Rules Serv. 12e.231, Case 5, 3 F. R. D. 168; *Best Foods, Inc. v. General Mills, Inc.*, D. Del. 1943, 7 Fed. Rules Serv. 12e.231, Case 7, 3 F. R. D. 275; *Braden v. Callaway*, E. D. Tenn. 1943, 8 Fed. Rules Serv. 12e.231, Case 1 (* * * most courts * * * conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings'). Accordingly, the reference to the 20 day time limit has also been eliminated since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

"Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 *Moore's Federal Practice*, 1938, Cum.

Supplement, §12.07, under 'Page 657'; also, *Holtzoff*, *New Federal Procedure and the Courts*, 1940, 35-41. And compare vote of Second Circuit Conference of Circuit and District Judges, June 1940, recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co. v. Mylish*, E. D. Pa. 1944, 8 Fed. Rules Serv. 12e.231, Case 6 ('Our experience * * * has demonstrated not only that "the office of the bill of particulars is fast becoming obsolete" * * * but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether.') *Walling v. American Steamship Co.*, W. D. N. Y. 1945, 4 F. R. D. 355, 8 Fed. Rules Serv. 12e.244, Case 8 (* * * the adoption of the rule was ill advised. It has led to confusion, duplication and delay.') The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words 'or to prepare for trial'—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling v. Alabama Pipe Co.*, W. D. Mo. 1942, 3 F. R. D. 159, 6 Fed. Rules Serv. 12e.244, Case 7; *Fleming v. Mason & Dixon Lines, Inc.*, E. D. Tenn. 1941, 42 Fed. Supp. 230; *Kellogg Co. v. National Biscuit Co.*, D. N. J. 1941, 38 Fed. Supp. 643; *Brown v. H. L. Green Co.*, S. D.

N. Y. 1943, 7 Fed. Rules Serv. 12e.231, Case 6; Pedersen v. Standard Accident Ins. Co., W. D. Mo. 1945, 8 Fed. Rules Serv. 12e.231, Case 8; Bowles v. Ohse, D. Neb. 1945, 4 F. R. D. 403, 9 Fed. Rules Serv. 12e.231, Case 1; Klages v. Cohen, E. D. N. Y. 1945, 9 Fed. Rules Serv. 8a.25, Case 4; Bowles v. Lawrence, D. Mass. 1945, 8 Fed. Rules Serv. 12e.231, Case 19; McKinney Tool & Mfg. Co. v. Hoyt, N. D. Ohio 1945, 9 Fed. Rules Serv. 12e.235, Case 1; Bowles

v. Jack, D. Minn. 1945, 5 F. R. D. 1, 9 Fed. Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken. Poole v. White, N. D. W. Va. 1941, 5 Fed. Rules Serv. 12e.231, Case 4, 2 F. R. D. 40. See also Bowles v. Gabel, W. D. Mo. 1946, 9 Fed. Rules Serv. 12e.244, Case 10. ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.")"

215. Motion to Strike Pleading for Failure to Obey Order for More Definite Statement.

(Caption.)

Defendant moves the court to strike the complaint herein and to dismiss the action with prejudice for plaintiff's failure for more than ten days after notice thereof to obey the order of this court, dated _____, 19—, directing plaintiff to file and serve a more definite statement.

Attorney for defendant.

Address.

Cross-Reference.

See notes to Forms 213 and 214, this Supplement.

216. Order Striking Pleading for Failure to Obey Order for More Definite Statement.

(Caption.)

This cause came on for hearing on defendant's motion to strike the complaint herein and it appearing to the court that plaintiff has failed for more than ten days after notice thereof to obey the order of this court dated _____, 19—, directing him to file and serve a more definite statement and there appearing to be no reasonable cause for such failure, it is

Ordered, that the complaint herein be and it is hereby stricken and dismissed with (without) prejudice.

United States district judge.

Cross-Reference.

See notes to Forms 213 and 214, this Supplement.

218. Motion to Dismiss, Presenting Defenses of Failure to State A Claim, of Lack of Service of Process, of Improper Venue, and of Lack of Jurisdiction Under Rule 12(b).

Note.

Amended Rule 12 (b) added "failure to join an indispensable party" as a ground for motion to dismiss.

The advisory committee's note to amended rule 12 (b) read:

"The addition of defense (7), 'failure to join an indispensable party,' cures

an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, Manner of Raising Objection of Non-Joiner of Indispensable Party, 1940, 2 Fed. Rules Serv. 658 and, 1942, 5 Fed. Rules Serv. 820. In one case, *United States v. Metropolitan Life Ins. Co.*, E. D. Pa. 1941, 36 Fed. Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

"Rule 12(b) (6), permitting a motion to dismiss for failure of the complaint to state claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. One the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara v. United States*, C. C. A. (2d), 1942, 129 Fed. (2d) 594, cert. den., 1942, 317 U. S. 686, 63 S. Ct. 258; *Boro Hall Corp. v. General Motors Corp.*, C. C. A. (2d), 1942, 124 Fed. (2d) 822, cert. den., 1943, 317 U. S. 695, 63 S. Ct. 436. See also *Kithcart v. Metropolitan Life Ins. Co.*, C. C. A. 8th, 1945, 150 Fed. (2d) 997, aff'g 62 Fed. Supp. 93.

"It has also been suggested that this practice could be justified on the ground that the federal rules permit 'speaking' motions. The Committee entertains the view that on motion under Rule 12(b) (6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated

in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term 'speaking motion' is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

"The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact on conflicting proof would be left uncertain.

"The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

"Under group (1) are: *Boro Hall Corp. v. General Motors Corp.*, C. C. A. (2d), 1942, 124 Fed. (2d) 822, cert. den., 1943, 317 U. S. 695, 63 S. Ct. 436; *Gallop v. Caldwell*, C. C. A. 3d, 1941, 120 Fed. (2d) 90; *Central Mexico Light & Power Co. v. Munch*, C. C. A. (2d) 1940, 116 Fed. (2d) 85; *National Labor Relations Board v. Montgomery Ward & Co.*, App. D. C. 1944, 79 U. S. App. D. C. 200, 144 Fed. (2d) 528, cert. den., 1944, 65 S. Ct. 134; *Urquhart v. American-La France Foamite Corp.*, App. D. C. 1944, 79 U. S. App. D. C. 219, 144 Fed. (2d) 542; *Samara v. United States*, C. C. A. (2d) 1942, 129 Fed. (2d) 594; *Cohen v. American Window Glass Co.*, C. C. A. (2d), 1942, 126 Fed. (2d) 111; *Sperry Products, Inc. v. Association of American Railroads*, C. C. A. (2d), 1942, 132 Fed. (2d) 408; *Joint Council Dining Car Employees Local 370 v. Delaware, Lackawanna and Western R. Co.*, C. C. A. (2d), 1946, 157 Fed. (2d) 417; *Weeks v. Bareco Oil Co.*, C. C. A. 7th, 1941, 125 Fed. (2d) 84; *Carroll v. Morrison Hotel Corp.*, C. C. A. 7th, 1945, 149 Fed. (2d) 404; *Victory v. Manning*, C. C. A. 3rd., 1942, 128 Fed. (2d) 415; *Locals No. 1470, No. 1469, and No. 1512 of International Longshoremen's Association v. Southern Pacific Co.*, C. C. A. 5th, 1942, 131 Fed. (2d) 605; *Lucking v. Delano*,

C. C. A. 6th, 1942, 129 Fed. (2d) 283; San Francisco Lodge No. 68 of International Association of Machinists v. Forrestal, N. D. Cal. 1944, 58 Fed. Supp. 466; Benson v. Export Equipment Corp., N. Mex. 1945, 164 P. (2d) 380, construing New Mexico rule identical with Rule 12(b) (6); F. E. Myers & Bros. Co. v. Gould Pumps, Inc., W. D. N. Y. 1946, 9 Fed. Rules Serv. 12b.33, Case 2, 5 F. R. D. 132, Cf. Kohler v. Jacobs, C. C. A. 5th, 1943, 138 Fed. (2d) 440; Cohen v. United States, C. C. A. 8th, 1942, 129 Fed. (2d) 733.

"Under group (2) are: Sparks v. England, C. C. A. 8th, 1940, 113 Fed. (2d) 579; Continental Collieries, Inc. v. Shober, C. C. A. 3d, 1942, 130 Fed. (2d) 631; Downey v. Palmer, C. C. A. 2d, 1940, 114 Fed. (2d) 116; DeLoach v. Crowley's Inc., C. C. A. 5th, 1942, 128 Fed. (2d) 378; Leimer v. State Mutual Life Assurance Co. of Worcester, Mass., C. C. A. 8th, 1940, 108 Fed. (2d) 302; Rossiter v. Vogel, C. C. A. 2d, 1943, 134 Fed. (2d) 908, compare s. c., C. C. A. 2d, 1945, 148 Fed. (2d) 292; Karl Kiefer Machine Co. v. United States Bottlers Machinery Co., C. C. A. 7th, 1940, 113 Fed. (2d) 356; Chicago Metallic Mfg. Co. v. Edward Katzinger Co., C. C. A. 7th, 1941, 123 Fed. (2d) 518; Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc., C. C. A. 8th, 1942, 131 Fed. (2d) 419; Publicity Bldg. Realty Corp. v.

Hannegan, C. C. A. 8th, 1943, 139 Fed. (2d) 583; Dioguardi v. Durning, C. C. A. 2d, 1944, 139 Fed. (2d) 774; Package Closure Corp. v. Sealright Co., Inc., C. C. A. 2d, 1944, 141 Fed. (2d) 972; Tahir Erk v. Glenn L. Martin Co., C. C. A. 4th, 1941, 116 Fed. (2d) 865; Bell v. Preferred Life Assurance Society of Montgomery, Ala., 1943, 320 U. S. 238, 64 S. Ct. 5.

"The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b) (6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12 (b) (6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion."

221. Answer Presenting Defenses Under Rule 12(b).

FIFTH DEFENSE

Plaintiff has failed to join A. B., who is an indispensable party——
—— to this action for the reason that ——.

Note.

Amended Rule 12(b) added "failure to join an indispensable party" as a defense which may, at the option of the

pleader, be made by motion or in a responsive pleading.

Cross-Reference.

See note to Form 218, this Supplement.

232. Motion to Dismiss Class Suit.

(Caption.)

The defendant moves that the complaint be dismissed on the ground that it fails to state a claim on which relief may be granted, to wit:

1. While the complaint purports to set forth a claim in behalf of a class, the persons on whose behalf the action is brought do not in fact constitute a class, in that their rights and interests are separate, distinct, and several, the action does not relate to any specific property, and there is no common question of law or fact affecting all the persons claimed to constitute the alleged class.

2. The number of members of the alleged class is not sufficiently large to make it impracticable to join all of them as parties to an action.

3. The plaintiffs do not adequately represent all the members of the alleged class.

Date —.

Attorney for defendant.

Address.

233. Motion to Dismiss Stockholder's Action.

(Caption.)

The defendant moves that the complaint be dismissed on the ground that it fails to state a claim on which relief may be granted, to wit:

1. The complaint fails to show that at the time of the transactions of which he complains, the plaintiff was a stockholder of the corporation in whose behalf this action is brought, or that his stock devolved on him thereafter by operation of law.

2. The complaint fails to show that the action is not collusive for the purpose of conferring on the court jurisdiction of an action over which it would not have jurisdiction otherwise.

3. The complaint fails to show that the plaintiff made sufficient efforts to procure the corporation to take the action desired by him or any sufficient reason for failure to make any such effort.

Date —.

Attorney for defendant.

Address.

CHAPTER 10—AFFIRMATIVE DEFENSES

Form

260A. Res judicata—Voluntary dismissals.

260A. Res Judicata—Voluntary Dismissals.

Heretofore and prior to the commencement of this action, an action entitled "— v. —" was brought in — Court by the plaintiff herein, against this defendant, on the same claim as that set forth in the complaint herein, and said action was voluntarily dismissed by the plaintiff. Thereafter and prior to the commencement of this action, an action entitled "— v. —" was brought in — Court by the plaintiff against this defendant on the same claim as that set forth in the complaint herein, and said action was voluntarily dismissed by the plaintiff. The

dismissal of the last-named action was an adjudication of said claim on the merits.

Cross-Reference.

See Rule 41 (a) (1) of the Rules of Civil Procedure, this supplement, p. 231.

CHAPTER 10A—PLAINTIFF'S RESPONSIVE MOTIONS AND PLEADINGS

Form

294. Motion to dismiss affirmative defense.
295. Objections to affirmative defense.
296. Motion to dismiss counterclaim.
297. Reply to counterclaim.

Form

298. Reply to affirmative defense of statute of limitations.
299. Reply to affirmative defense of fraud.

294. Motion to Dismiss Affirmative Defense.

(Caption.)

The plaintiff moves to dismiss the (first) defense alleged in the defendant's answer on the ground that it is insufficient upon the face thereof.

Date ———.

Attorney for plaintiff.

Address.

295. Objections to Affirmative Defense.

(Caption.)

The plaintiff objects to the (first) defense contained in the defendant's answer on the ground that it fails to state a legal defense to the plaintiff's claim.

Date ———.

Attorney for plaintiff.

Address.

Source of Form.

Dysart v. Remington Rand, Inc. (D. C. Conn.), 31 Fed. Supp. 296.

NOTES TO DECISIONS

Consolidation of Motions.

To allow separate objections and defenses to be raised by separate motions would defeat the general purpose of the Rules of Civil Procedure and prolong litigation. *Victory v. Manning* (C. C. A. 3), 128 Fed. (2d) 415.

Motion for Dismissal.

Motion to dismiss complaint as insufficient in law admits all of the allegations of fact contained in the complaint.

Snyder v. John J. Casale, Inc. (D. C. N. Y.), 49 Fed. Supp. 926.

Motion for Judgment on the Pleadings.

Order granting defendant's motion for judgment on the pleadings before answer will not be disturbed on appeal if plaintiff raised no question at the time an oral argument was had, and there is no contention that plaintiff was prejudiced thereby. *Time, Inc. v. Viobin Corp.* (C. C. A. 7), 128 Fed. (2d) 860.

A motion for judgment on the pleadings admits all facts well pleaded, but does not admit conclusions of law, or the validity of a defense of unconstitutionality. *Rosenhan v. United States* (C. C. A. 10), 131 Fed. (2d) 932.

In an action by an employee against employer for violation of New York labor law, employer was not entitled to a judgment on the pleadings by alleging that action was barred by New York Compensation Act. *Conner v. E. I. Du Pont De Nemours & Co., Inc.* (D. C.-N. Y.), 49 Fed. Supp. 391.

On motion for judgment on the pleadings the court is concerned only with the sufficiency of the pleadings. *Noel v. Baskin*, 76 App. D. C. 332, 131 Fed. (2d) 231.

Motion to Strike.

A motion to strike matter alleging fraud on the ground that it is stated with too much particularity should not be granted. *Israel v. Alexander* (D. C.-N. Y.), 50 Fed. Supp. 1007.

A motion to strike should be granted as to allegations calling for construction of claims of a patent and containing evidentiary matter. *Minnesota Min. & Mfg. Co. v. Carborundum Co.* (D. C.-Del.), 3 Fed. R. Dec. 5.

In an action for declaratory judgment by insurer against the insured and the injured party, plaintiff's motion to strike that portion of the cross-claim relating to exemplary damages was denied. *United*

States Fid. & Guar. Co. v. Janich (D. C.-Cal.), 3 Fed. R. Dec. 16.

Allegations material on the question of damages should not be stricken from the complaint. *Greenspun v. Roos* (D. C.-N. Y.), 155 Bull. 20.

A motion to strike allegations of fact that defendant would have a right to present at trial and support by testimony should not be granted. *United Distillers Agency, Inc. v. Old Rock Distilling Co.* (D. C.-Mo.), 162 Bull. 24, 3 Fed. R. Dec. 179.

In an action for breach of contract a motion to strike defendant's defense of lack of mutuality should not be granted even though a study of the contract discloses complete mutuality, as defendant may advance same as a defense, but motion to strike a paragraph in defendant's answer that alleged the parties misunderstood the contract should be granted if statements in other paragraphs disclose a complete understanding by the parties. *United Distillers Agency, Inc. v. Old Rock Distilling Co.* (D. C.-Mo.), 162 Bull. 24, 3 Fed. R. Dec. 179.

Waiver of Defenses.

Since no reply is required unless an answer contains a counterclaim denominated as such, a plaintiff loses no rights by failing to plead an affirmative defense to new matters set out in the answer. *Gulf Ref. Co. v. Fetschan* (C. C. A. 6), 130 Fed. (2d) 129.

296. Motion to Dismiss Counterclaim.

(Caption.)

The plaintiff moves to dismiss the counterclaim alleged in the defendant's answer on the ground that it fails to state a claim upon which relief can be granted.

Date ____.

Attorney for plaintiff.

Source of Form.

Myers v. Beckman (D. C.-Okla.), 1 Fed. R. Dec. 99.

Address.

NOTES TO DECISIONS

Counterclaim and Answer.

A counterclaim must be pleaded as fully and distinctly as an original cause of action and an answer to a counterclaim must be pleaded as fully and completely as an answer to an original suit. *State Mut. Life Assur. Co. v. Leimer* (D. C.-Mo.), 3 Fed. R. Dec. 145.

Motion to Strike.

In an action for declaratory judgment by insurer against the insured and the injured party, plaintiff's motion to strike that portion of the cross-claim relating to exemplary damages was denied. *United States Fid. & Guar. Co. v. Janich* (D. C.-Cal.), 3 Fed. R. Dec. 16.

297. Reply to Counterclaim.

(Caption.)

The plaintiff replying to the counterclaim alleged in the defendant's answer herein:

1. Admits the allegations contained in paragraph — of the answer, alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph — of the answer, and denies each and every other allegation contained in paragraphs — of the answer.

FIRST DEFENSE

[Here plead affirmative defenses to counterclaim in same manner as to a complaint].

Attorney for plaintiff.

Address.

Cross-Reference.

Reply to counterclaim, rule 7 (a), this Supplement.

Note of Advisory Committee to Rule 7(a):

"This amendment eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a

reply only to the counterclaim or is a general reply to the answer containing the counterclaim. The Commentary, Scope of Reply Where Defendant Has Pleaded Counterclaim, 1939, 1 Fed. Rules Serv. 672; Fort Chartres and Ivy Landing Drainage and Levee District No. Five v. Thompson, E. D. Ill. 1945, 8 Fed. Rules Serv. 13.32, Case 1."

298. Reply to Affirmative Defense of Statute of Limitations.

(Caption.)

The plaintiff, in compliance with the order of the court made on —, 19—, replies to the (first) defense in the defendant's answer herein as follows:

1. The plaintiff denies the allegations contained in said defense.
2. The plaintiff alleges that on —, 19—, the defendant in writing acknowledged the obligation referred to in the complaint, thereby tolling the period of the statute of limitations.

Attorney for plaintiff.

Address.

299. Reply to Affirmative Defense of Fraud.

(Caption.)

The plaintiff in compliance with the order of this court dated —, 19—, replies to the defense in the defendant's answer as follows:

1. The plaintiff was induced to sign the release referred to in said defense by false and fraudulent representations made by the defendant to the plaintiff, to wit, that (here insert). The defendant knew that said representations were false and fraudulent but made them with the intent

to induce plaintiff to rely thereon. In reliance on said representations and believing them to be true, the plaintiff signed and delivered the said release.

Attorney for plaintiff.

Note.

See *Downey v. Palmer* (S. D.-N. Y.),
31 Fed. Supp. 83.

Address.

CHAPTER 11—THIRD-PARTY PRACTICE

Form

- 303A. Motion to vacate ex parte order granting leave to bring in third party.
306. Third-party complaint—Damages, faulty airplane parts.
307. Third-party complaint—Damages, impure food.

Form

308. Motion to amend complaint to assert claim against third-party defendant.
309. Motion to vacate order granting leave to bring in third party, based on plaintiff's failure to amend complaint.

Introduction.—* * *

Note.

Portions of paragraphs 2 and 3, page 169, parent volume, indicating 3rd party practice where defendant seeks to im-

plead 3rd party liable to plaintiff directly, are no longer applicable in view of amendment to Rule 14(a).

300. Motion to Bring in Third-party Defendant.

NOTES TO DECISIONS

Amending Complaint on Third-Party Addition.

In an action by a passenger against a bus company for injuries received when bus collided with a truck and trailer, where bus company impleaded owner and operator of truck and trailer, plaintiff was entitled to amend his complaint to charge all with negligence, in spite of the fact that he had not made them defendants in the original complaint. *Bates v. Miller* (C. C. A. 2), 133 Fed. (2d) 645.

Bringing in Third-Party Defendant.

In an action to enforce the liability of stockholders of an insolvent bank, defendants may not implead the sole creditor of the bank as third-party defendant for the purpose of attacking the validity of the comptroller's assessment. *Heitman v. Davis* (C. C. A. 7), 119 Fed. (2d) 975.

In a negligence action an order bringing in a joint tortfeasor as a third-party defendant will be set aside if the original defendant has no right of contribution against the third-party under the laws of the state in which the accident occurred. The Rules of Civil Procedure should not be construed so as to give a recovery not obtainable under the laws of the state in which the cause of action originated. *Brown v. Cranston* (C. C. A. 2),

132 Fed. (2d) 631, affg. 2 Fed. R. Dec. 270.

In an action on a war risk insurance policy, in which a nonresident third person was made a party, under a statute permitting the government to bring in all persons claiming an interest in the insurance, plaintiff may not use third-party practice to assert against such third person a claim which did not arise out of the contract in suit, since such third person could not have been brought within the jurisdiction of the court by service of process outside the district. *Moreno v. United States* (D. C.-Mass.), 35 Fed. Supp. 657. Affd. 120 Fed. (2d) 128.

In an action to recover on a statutory stockholder's liability, defendant, who was the registered owner of stock, was permitted to implead as third-party defendants the legal owners of the stock who had failed to have the stock registered in their own name. *Schram v. Costello* (D. C.-Mich.), 36 Fed. Supp. 525.

In an action in which jurisdiction is based solely on diversity of citizenship, plaintiff may not maintain a claim against a third-party defendant unless there is diversity of citizenship between them. *Hoskie v. Prudential Ins. Co.* (D. C.-N. Y.), 39 Fed. Supp. 305.

A third party may be brought into an action although its alleged liability is

based on a contract not related to the cause of action forming the basis of the plaintiff's claim. *Brady v. Black Diamond S. S. Co.* (D. C.-N. Y.), 45 Fed. Supp. 338; *United States v. Pryor* (D. C.-Ill.), 2 Fed. R. Dec. 382.

A defendant may not implead a third-party defendant on the ground that he alone and not the defendant is liable to the plaintiff. *Brady v. Black Diamond S. S. Co.* (D. C.-N. Y.), 45 Fed. Supp. 338.

In a personal injury action arising out of an automobile collision, the plaintiff, who was the passenger in one of the vehicles, sued the driver of the other vehicle. The defendant was permitted to bring in as a third-party defendant the driver of the vehicle in which plaintiff was riding. The commencement of the action tolls the statute of limitations as to a third-party defendant who may be liable for all or part of plaintiff's claim. The Pennsylvania statute of limitations, as to negligence actions, does not apply to actions by a defendant to recover from a person who may be liable for all or part of plaintiff's claim. *Adam v. Vacquier* (D. C.-Pa.), 48 Fed. Supp. 275.

A motion for leave to bring in a third-party defendant may be made ex parte before answer even if an answer is filed, during the interval between submission and granting of the motion. The placing of an ex parte motion to bring in a third-party defendant in the hands of the proper court officer for submission to the judge before filing an answer meets the requirements of Rule 14(a) regarding notice. *Buttorff v. Sun Oil Co.* (D. C.-Pa.), 2 Fed. R. Dec. 508.

In an action against a railroad company to recover damages for death caused by a collision between two trains,

the defendants may bring in the crew of the train that allegedly caused the accident as third-party defendants. *Greenleaf v. Huntingdon & B. T. M. R. & Coal Co.* (D. C.-Pa.), 3 Fed. R. Dec. 24.

In a negligence action, defendant may bring in plaintiff's employer as third-party defendant if it appears that the employer may owe a duty or obligation to the original defendant. *Flanagan v. Potomac Elec. Power Co.* (D. C.-D. C.), 3 Fed. R. Dec. 162.

No Right to Elect Defendant.

In a negligence action if several parties are at fault, plaintiff has no right of election of a defendant. *Adam v. Vacquier* (D. C.-Pa.), 48 Fed. Supp. 275.

Refusal to Assert Third-Party Claim.

Under New York law, if defendant in tort action brings in additional defendants, and plaintiff does not elect to take a joint judgment, the impleaded defendants must be dismissed. *Bates v. Miller* (C. C. A. 2), 133 Fed. (2d) 645.

The fact that plaintiff refuses to assert a claim against the third-party defendant does not bar the third-party proceeding if the third-party complaint asserts that he is or may be liable to defendant or original plaintiff for all or part of plaintiff's claim against the original defendant. *Sussan v. Strasser* (D. C.-Pa.), 36 Fed. Supp. 266.

Plaintiff's refusal to assert a claim against a third-party defendant will not bar the third-party proceeding if the third-party complainant asserts that the third-party defendants may be liable directly to the defendant in the event a judgment is obtained against him. *Greenleaf v. Huntingdon & B. T. M. R. & Coal Co.* (D. C.-Pa.), 3 Fed. R. Dec. 24.

303A. Motion to Vacate Ex Parte Order Granting Leave to Bring in Third Party.

(Caption.)

AB, the third-party defendant, moves to vacate the order made herein on ———, 19——, granting leave to the defendant to serve a third-party summons and a third-party complaint herein, and to strike the third-party complaint, on the ground that the claim referred to in the third-party complaint is not the same as the claim set forth in the plaintiff's complaint herein (or set forth other suitable ground for motion).

Attorney for third-party defendant.

Address.

Source of Form.

Crim v. Lumbermens Mut. Casualty Co. (D. C.-D. C.), 26 Fed. Supp. 715,

and *McPherrin v. Hartford Fire Ins. Co.* (D. C.-Nebr.), 1 Fed. R. Dec. 88.

304. Third-party Summons.**NOTES TO DECISIONS****Sufficiency of Service.**

In an automobile accident case, substituted service on the secretary of state under a Maryland state statute was held

to be a sufficient service of third-party summons and complaint on a nonresident motorist. *Malkin v. Arundel Corp.* (D. C.-Md.), 36 Fed. Supp. 948.

305. Third-Party Complaint.

United States District Court for the Southern District of

New York

Civil Action, File Number _____

| | | |
|--------------------------------------|--------------------------|--------------------------|
| A. B., | } Plaintiff, | } Third-Party complaint. |
| v. | | |
| C. D., | | |
| Defendant and Third-Party Plaintiff, | } Third-Party Defendant. | |
| v. | | |
| E. F., | | |

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____

Attorney for C. D., Third-Party Plaintiff.

Address: _____

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms, Form 22, changed to conform with amendment to Rule 14.

Cross-Reference.

Third party practice Rule 14, this Supplement, p. 226.

Note of Advisory Committee to Rule 14(a):

"The provisions in Rule 14(a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that

under Rule 14(a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink v. Holland Township*, D. N. J. 1940, 31 Fed. Supp. 229, noted, 1940, 88 U. Pa. L. Rev. 751; *Connelly v. Bender*, E. D. Mich. 1941, 36 Fed. Supp. 368; *Whitmire v. Partin v. Milton*, E. D. Tenn. 1941, 2 F. R. D. 83, 5 Fed. Rules Serv. 14a.513, Case 2; *Crim v. Lumbermen's Mutual Casualty Co.*, D. D. C. 1939, 26 Fed. Supp. 715; *Carbola Chemical Co., Inc. v. Trundle*, S. D. N. Y. 1943, 3 F. R. D. 502, 7 Fed. Rules Serv. 14a.224, Case 1; *Roadway Express, Inc. v. Automobile Ins. Co. of*

Hartford, Conn. v. Providence Washington Ins. Co., N. D. Ohio 1945, 8 Fed. Rules Serv. 14a.513, Case 3. In *Delano v. Ives*, E. D. Pa. 1941, 40 Fed. Supp. 672, the court said: " * * the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff." Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink v. Holland Township*, supra; *Malkin v. Arundel Corp.*, D. Md. 1941, 36 Fed. Supp. 948; also *Koenigsberger*, Suggestions for Changes in the Federal Rules of Civil Procedure, 1941, 4 Fed. Rules Serv. 1010. But cf. *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.*, M. D. Ga. 1943, 52 Fed. Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing. *Hoskie v. Prudential Ins. Co. of America v. Lorrac Real Estate Corp.*, E. D. N. Y. 1941, 39 Fed. Supp. 305; *Johnson v. G. J. Sherrard Co. v. New England Telephone & Telegraph Co.*, D. Mass. 1941, 5 Fed. Rules Serv. 14a.511, Case 1, 2 F. R. D. 164; *Thompson v. Cranston*, W. D. N. Y. 1942, 6 Fed. Rules Serv. 14a.511, Case 1, 2 F. R. D. 270, aff'd, C. C. A. 2d, 1942, 132 Fed. (2d) 631, cert. den., 1943, 319 U. S. 741, 63 S. Ct. 1028; *Friend v. Middle Atlantic Transportation Co.*, C. C. A. 2d, 1946, 153 Fed. (2d) 778, cert. den., 1946, 66 S. Ct. 1370; *Herrington v. Jones*, E. D. La. 1941, 5 Fed. Rules Serv. 14a.511, Case 2, 2 F. R. D. 108; *Banks v. Employers' Liability Assurance Corp. v. Central Surety & Ins. Corp.*, W. D. Mo. 1943, 7 Fed. Rules Serv. 14a.11, Case 2; *Saunders v. Baltimore & Ohio R. Co.*, S. D. W. Va. 1945, 9 Fed. Rules Serv. 14a.62, Case 2; *Hull v. United States Rubber Co. v. Johnson Larsen & Co.*, E. D. Mich. 1945, 9 Fed. Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for use of Trust Co. of Chicago v. Maryland Casualty Co.*, C. C. A. 7th, 1942, 132 Fed. (2d) 850, 853. Contra: *Sklar v. Hayes v. Singer*, E. D. Pa. 1941, 4 Fed. Rules Serv. 14a.511, Case 2, 1 F. R. D. 594. Discussion of the problem will be found in *Commentary, Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party De-*

fendant, 1942, 5 Fed. Rules Serv. 811; *Commentary, Federal Jurisdiction in Third-Party Practice*, 1943, 6 Fed. Rules Serv. 766; *Holtzoff, Some Problems Under Federal Third-Party Practice*, 1941, 3 La. L. Rev. 408, 419-420; 1 *Moore's Federal Practice*, 1938, Cum. Supplement §14.08. For these reasons therefore, the words 'or to the plaintiff' in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words 'the plaintiff' in the second sentence of the subdivision, and the words 'or to the third-party plaintiff' in the concluding sentence thereof have likewise been eliminated.

"The third sentence of Rule 14(a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.*, M. D. Ga. 1943, 52 Fed. Supp. 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counter-claims and cross-claims provided in Rules 12 and 13.

"The sentence reading 'The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff, or to the third-party plaintiff' has been stricken from Rule 14(a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

"The elimination of the words 'the third-party plaintiff, or any other party' from the second sentence of Rule 14(a),

together with the insertion of the new stance but are merely for the purpose phrases therein, are not changes of sub- of clarification."

306. Third-party Complaint—Damages, Faulty Airplane Parts.

(Caption.)

1. The plaintiff, AB, has filed against the defendant CD, a complaint, a copy of which is hereto attached as "Exhibit A."

2. At all times hereinafter mentioned the third-party defendant, EF Corporation, was and now is a corporation organized and existing under the laws of the state of —, and the third-party defendant, GH Corporation was and now is a corporation organized and existing under the laws of the state of —.

3. The third-party defendant EF Corporation manufactured the engine used in the airplane referred to in the complaint herein and sold and delivered said engine to the third-party plaintiff.

4. The third-party defendant, GH Corporation, manufactured and sold and delivered to the third-party defendant, EF Corporation, the cylinder barrel forging, which was inserted in said engine. On information and belief to the knowledge of said third-party defendants, the said forging was negligently and defectively manufactured and was unfit and dangerous for the purposes for which it was intended.

5. The airplane wreck referred to in the complaint and the death of the plaintiff intestate were due to the negligence of said third-party defendants in the manufacture of said engine and cylinder barrel forging.

Wherefore, the defendant CD demands judgment against third-party defendants EF Corporation and GH Corporation for whatever amount judgment may be rendered against the defendant and in favor of the plaintiff, and costs.

Attorney for third-party plaintiff.

Address.

Source of Form.

Morrell v. United Air Lines Transport Corp. (D. C.-N. Y.), 29 Fed. Supp. 757.

307. Third-party Complaint—Damages, Impure Food.

(Caption.)

1. The plaintiff AB, has filed against the defendant CD, a complaint, a copy of which is hereto attached as "Exhibit A."

2. At all times hereinafter mentioned, the third-party defendant EF Corporation was and now is a corporation organized and existing under the laws of the state of —, and engaged in the preparation and distribution of certain food products, which were sold by it in sealed cans.

3. The articles of food referred to in the complaint herein were purchased by the defendant from the third-party defendant in a sealed can

on the day preceding that on which they were served by the defendant to the plaintiff.

4. If any of said articles of food were unwholesome, poisonous, deleterious, or otherwise unfit for human consumption, such condition was caused solely and entirely by the negligence and carelessness of the third-party defendant.

Wherefore, the defendant prays for judgment against the third-party defendant for all sums that may be adjudged against the defendant in favor of plaintiff, with costs.

Attorney for plaintiff.

Address.

Note.

See Jeub v. B/G Foods, Inc. (D. C.-Minn.), 2 Fed. R. Dec. 238.

308. Motion to Amend Complaint to Assert Claim against Third-party Defendant.

(Caption.)

The plaintiff moves for leave to amend the complaint by asserting a claim against CD, the third-party defendant, on the ground that by order dated ———, 19——, the defendant was granted leave to serve a third-party complaint on said CD; and a third-party summons and third-party complaint have been served on said CD. A copy of the proposed amendment to the complaint is hereto annexed.

Date——.

Attorney for plaintiff.

Address.

CHAPTER 12—PARTIES

Form

342. Motion to compel additional plaintiff to be brought in.

342. Motion to Compel Additional Plaintiff to be Brought in.

(Caption.)

The defendant moves that ——— Insurance Company be made a party plaintiff herein, on the following grounds:

This action is brought to recover damages for personal injuries sustained as the result of an automobile collision. It appears from plaintiff's answers to interrogatories filed by defendant that the plaintiff was

compensated by — Insurance Company for a part of the damages sustained by him, and that — Insurance Company claims to be subrogated to the plaintiff's rights to the extent of its payment. By virtue of the premises, — Insurance Company is an indispensable party plaintiff to this action.

Date —.

Attorney for defendant.

Address.

Note.

See *Williams v. Powers* (D. C.-Ohio),
2 Fed. R. Dec. 362.

CHAPTER 12A—JOINDER OF CLAIMS

Form

343. Motion to sever.

343. Motion to Sever.

(Caption.)

The defendant CD moves that the first and second claims contained in the complaint be severed and proceeded with separately on the ground that he is affected only by the first claim and is not affected by the second claim.

Date —.

Attorney for defendant CD.

Address.

Note.

See *Federal Housing Admr. v. Christianson* (D. C.-Conn.), 26 Fed. Supp. 419,

and *Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co.* (D. C.-Mass.), 29 Fed. Supp. 480.

NOTES TO DECISIONS

Joinder of Claims.

Plaintiff, in a removed action for breach of contract, may amend his complaint so as to include a claim under the antitrust laws. It is unnecessary to institute a separate action for violation of the antitrust laws and then consolidate with the removed action, because the claim under the antitrust laws may be added to the removed action by amendment. The federal court has jurisdiction to try a claim joined by an amended petition that the state court would have lacked if the claim had been advanced there. *Bee Mach. Co., Inc. v.*

Freeman (C. C. A. 1), 131 Fed. (2d) 190. Affd. 319 U. S. 448, 87 L. ed. 1509, 63 Sup. Ct. 1146.

Since the Rules of Civil Procedure do not apply to proceedings in admiralty, a seaman injured while unloading his ship may not join a common-law action against the owners of the unloading equipment with an action under the Jones Act against his employer. *Eggleston v. Republic Steel Corp.* (D. C.-N. Y.), 47 Fed. Supp. 658.

In a patent case, the issues of infringement and invasion of trade secrets raised in the original complaint against a cor-

poration and one of its officers should not be tried separately from the issues of patent validity and continued infringement raised in a supplemental complaint against the officer after the corporation had consented to a decree against it on the question of patent infringement. Issues in a patent case should not be separated for trial if to do so would inconvenience the court or prejudice the rights of the parties, and the determination of any one issue would not dispose of the entire litigation. The granting of a motion for a separate trial of the issues in an original complaint in a patent case from those raised in a supplemental complaint would defeat the purpose of supplemental pleading. *Conmar Products Corp. v. Lamar Slide Fastener Corp.* (D. C.-N. Y.), 163 Bull. 76, 50 Fed. Supp. 1019.

Parties in Interest.

In an action for declaratory judgment of nonliability on fire insurance policies, a second insurance company, which advanced funds to the insured on an indemnity contract repayable only out of any judgment recovered from the insurer, was not a real party in interest and need not be joined as a party defendant. *Western Fire Ins. Co. v. Word* (C. C. A. 5), 131 Fed. (2d) 541.

Separate Trials.

Where receiver of an insurance company filed separate claim to assets deposited in Iowa, separate judgment thereon was proper. *Lydick v. Fischer* (C. C. A. 5), 135 Fed. (2d) 983.

CHAPTER 13—INTERVENTION

Form

358A. Motion to intervene in action under Fair Labor Standards Act.

Form

370. Motion by subrogee to intervene.

350. Motion to Intervene as a Defendant under Rule 24.

Cross-Reference.

Intervention, rule 24.

Note of Advisory Committee to rule 24.

"The addition to subdivision (a) (3) covers the situation where property may be in the actual custody of some other officer or agency—such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending.

"The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see *Matter of Bender Body Co.*, Ref. Ohio 1941, 47 Fed. Supp. 224, aff'd as moot, N. D. Ohio 1942, 47 Fed. Supp. 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above

ceiling prices. Compare, however, *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 1940, 310 U. S. 434, 60 S. Ct. 1044, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission v. Long Island Lighting Co.*, C. C. A. 2d, 1945, 148 Fed. (2d) 252, judgment vacated as moot and case remanded with direction to dismiss complaint, 1945, 325 U. S. 833, 65 S. Ct. 1085. For discussion see *Commentary, Nature of Permissive Intervention Under Rule 24b*, 1940, 3 Fed. Rules Serv. 704; *Berger, Intervention by Public Agencies in Private Litigation in the Federal Courts*, 1940, 50 Yale L. J. 65.

"Regarding the construction of subdivision (b) (2), see *Allen Calculators, Inc. v. National Cash Register Co.*, 1944, 322 U. S. 137, 64 S. Ct. 905."

NOTES TO DECISIONS

Permissive Intervention.

In an action based on a federal statute, resort to the spurious class action device to facilitate intervention is unnecessary. When general jurisdiction is conferred by a federal statute, those who have a common interest in the questions of law or fact involved may participate in the

action without independent grounds of jurisdiction. An intervenor whose only interest is a common question of law or fact must show independent grounds of jurisdiction. *Hunter v. Southern Indem. Underwriters, Inc.* (D. C.-Ky.), 47 Fed. Supp. 242.

Right to Intervene.

In order to intervene as of right in a secondary action by shareholders, intervenor must show that his interests are or may be inadequately represented and that he will or may be bound by a judgment in the action. *Mullins v. De Soto Secur. Co., Inc.* (D. C.-La.), 45 Fed. Supp. 871.

In an action filed by a bondholder for himself and as attorney in fact for other owners, a motion to intervene by one of the coowners filed after bondholder had entered notice of appeal, and then withdrawn by turning in his bonds, will be granted as a motion to amend, so as to enable coowner to complete the appeal.

American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co. (D. C.-N. Y.), 161 Bull. 76.

In a tax action against a railroad a stockholder whose rights were merely derivative should not be permitted to intervene and is not entitled to notice of hearing on a supplemental petition for judgment if the defendant through which his rights were derived did not appeal from the original judgment, but stockholders should be allowed to intervene if the application is timely made and there is no showing that such intervention will prejudice the rights of the original parties. *United States v. Warren R. Co.* (D. C.-N. Y.), 164 Bull. 62.

358A. Motion to Intervene in Action under Fair Labor Standards Act.

(Caption.)

EF moves for leave to intervene as a plaintiff in this action, on the ground that this is a class suit brought by defendant's employees to recover balance of wages due them under the Fair Labor Standards Act (U. S. C., Title 29, § 201 et seq.), the plaintiff is one of such employees to whom a balance of wages is due from defendant as alleged in the complaint, and the plaintiff desires to recover judgment in this action for balance of wages due him.

Date ____.

 Attorney for EF.

Note.

See *Saxton v. W. S. Askew Co.* (D. C.-Ga.), 35 Fed. Supp. 519.

Address.

NOTES TO DECISIONS**Right to Intervene.**

Employees described as elevator operators and janitors can not bring a class action to recover overtime compensation under the Fair Labor Standards Act (9 F. C. A., Title 29, § 201 et seq.; U. S. C. A., Title 29, § 201 et seq.; id. U. S. C.) for themselves and others employed as window washers, scrub women, and maintenance men since the character of the right sought to be enforced is neither joint, common, nor secondary, no specific property is involved, nor is there a common question of law or fact, nor a common relief sought. Employees similarly situated may join their actions to recover overtime compensation under the Fair Labor Standards Act and the Rules of Civil Procedure. *Lofther v. First Nat. Bank* (D. C.-Ill.), 45 Fed. Supp. 936.

An action under the Fair Labor Standards Act (F. C. A., Title 29, § 201 et seq.; U. S. C. A., Title 29, § 201 et seq.; id. U. S. C.) to recover overtime compensation presents a proper case for intervention by other employees similarly situated. *Lofther v. First Nat. Bank* (D. C.-Ill.), 45 Fed. Supp. 936.

The application of the administrator of the wage and hour division to intervene in an action to recover damages for overtime work filed sixteen months after removal to a federal court should be denied if the administrator had no claim or interest in any possible judgment, and such judgment could not effect the administration of the law. *Jacobs v. Volney Felt Mills, Inc.* (D. C.-Ind.), 47 Fed. Supp. 493.

370. Motion by Subrogee to Intervene.

(Caption.)

— Insurance Company moves for leave to intervene as a plaintiff in this action to assert a claim against defendant by way of subrogation to the rights of plaintiff, on the following grounds:

This action is brought to recover damages for personal injuries sustained as the result of an automobile collision. The applicant compensated the plaintiff for a part of the damages sustained by him and claims to be subrogated to the plaintiff's rights against defendant to the extent of its payment.

Date —.

Attorney for defendant.

Address.

Note.

See *Williams v. Powers* (D. C.-Ohio),
2 Fed. R. Dec. 362.

CHAPTER 14—AMENDED AND SUPPLEMENTAL PLEADINGS

Form

390. Supplemental complaint in creditor's suit.

Form

391. Supplemental answer—Res judicata.

375. Motion for Leave to Amend Pleading.**NOTES TO DECISIONS****Amendment of Pleadings.**

An action in which a cooperative corporation sued for damages on behalf of its members should not be dismissed for insufficiency merely because of failure to properly plead, if the plaintiffs have individual rights of action, since leave to amend the complaint should have been granted. *Farmers Coop. Oil Co. v. Socony-Vacuum Oil Co., Inc.* (C. C. A. 8), 133 Fed. (2d) 101.

The provision of Rule 15(b) as to amendment of pleadings after judgment looks to supporting the judgment by the amendment, or to making the record show more perfectly what was really tried and decided. It does not authorize an amendment to nullify the judgment and begin a new contest. *United States v. Brookhaven* (C. C. A. 5), 134 Fed. (2d) 442.

If an action is remanded for rehearing on issues of laches, estoppel, and fraud raised by a motion for a new trial overruled below on other grounds, the pleadings may be amended so as to include those issues. *Ruppert v. Ruppert*, — App. D. C. —, 134 Fed. (2d) 497.

Denial of Leave to Amend.

Denial of leave to amend is not an abuse of discretion if to allow the amendment would avail the offerer nothing, or if the amended complaint was subject to summary dismissal, it being a mere matter of form whether the amended complaint was accepted and then dismissed, or refused at the outset. *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.* (C. C. A. 2), 131 Fed. (2d) 545. Aff'd. by equally divided court 320 U. S. 711, 88 L. ed. 417, 64 Sup. Ct. 187.

In a patent case after answer has been filed, a motion for leave to amend complaint by omitting prayer for injunction and accounting and by demanding a jury trial will be denied if it appears that the purpose is to secure a jury trial on the issues raised by the complaint and the case is of such nature that it ought not to be tried by a jury. *Stewart-Warner Corp. v. Staley* (D. C.-Pa.), 2 Fed. R. Dec. 446.

In an action for infringement of trade name, a motion for leave to amend complaint by omitting request for injunctive

relief will not be granted on the eve of trial if it appears that the only purpose of the amendment is to secure a jury trial. *Sterling Products Corp. v. Sterling Drug, Inc.* (D. C.-N. Y.), 160 Bull. 30.

Supplemental Pleadings.

Supplemental pleadings may be allowed in order to set forth transactions, occurrences or events which have happened since the date of the pleadings

sought to be supplemented. *Rather v. Paramount Pictures, Inc.* (D. C.-N. Y.), 155 Bull. 25.

The purpose of a supplemental complaint is to present facts accrued since the commencement of the action which should be litigated with the original matters and enlarge the relief to which plaintiff is entitled. *Conmar Products Corp. v. Lamar Slide Fastener Corp.* (D. C.-N. Y.), 163 Bull. 33, 50 Fed. Supp. 1019.

390. Supplemental Complaint in Creditor's Suit.

(Caption.)

Plaintiff for his supplemental complaint served pursuant to leave granted by order of this court dated ———, 19—, alleges:

1. Subsequently to the filing of the complaint and on ———, 19—, the plaintiff recovered judgment against the defendant for ——— dollars (\$——), in ——— Court, in an action entitled “——, plaintiff, against ——, defendant.” Execution was duly issued on said judgment and returned nulla bona. No part of said judgment has been paid.

Wherefore, plaintiff prays that the relief prayed for in the original complaint be extended to the aforesaid judgment.

Attorney for plaintiff.

Address.

Note.

See *Consolidated Naval Stores Co. v. Brannan Turpentine Co.* (D. C.-S. Car.), 46 Fed. Supp. 273.

391. Supplemental Answer—Res Judicata.

(Caption.)

Plaintiff for his supplemental answer served pursuant to leave granted by order of this court dated ———, 19—, alleges:

1. Subsequently to the service of defendant's answer the matters and things complained of in the complaint were duly adjudicated on the merits in an action between the parties hereto in ——— Court, entitled “——, plaintiff, against ——, defendant,” brought on the same claim as that set forth in the complaint. In said action a final judgment was rendered on ——— for the defendant dismissing the complaint on the merits.

Wherefore, the defendant demands judgment against the plaintiff dismissing the complaint with costs.

Attorney for defendant.

Address.

Note.

See *F. W. Fitch Co. v. Camille, Inc.*
(D. C.-N. Y.), 32 Fed. Supp. 838.

CHAPTER 16—DEPOSITIONS AND DISCOVERY

SECTION 2—INTERROGATORIES

Form

455A. Additional interrogatories to parties.

455A. Additional Interrogatories to Parties.

1. State names and addresses of all persons who witnessed or were present at the collision referred to in the complaint.

2. When and by whom was a report made to the defendant in respect to the accident referred to in the complaint.

(The foregoing interrogatories may be suitable in a tort case and were sustained in *Creden v. Central R. Co. of New Jersey* (D. C.-N. Y.), 1 Fed. R. Dec. 168.)

3. State whether you had any conversation with any person or persons at the scene of and after the accident referred to in the complaint, and if so, state the contents of the conversation.

(The foregoing interrogatory may be suitable in a tort case and was upheld in *Tudor v. Leslie* (D. C.-Mass.), 1 Fed. R. Dec. 448.)

4. State what claims of the patent in suit are alleged to have been infringed by defendant.

5. Specify in detail what device or devices used or manufactured by defendant are alleged to infringe the patent in suit, indicating which claim or claims of the patent are alleged to have been infringed by each of such devices.

6. Specify what patents and other prior publications will be offered by the defendant in evidence at the trial.

(The foregoing interrogatories may be suitable in a patent case. Interrogatory No. 6 was sustained in *Nakken Patents Corp. v. Rabinowitz* (D. C.-N.Y.), 1 Fed. R. Dec. 90.)

7. State the date on which plaintiff claims to have made the invention covered by the patent in suit, date and place of the first disclosure of the invention and to whom made, date and place of the first drawing of the invention, date, place, and manner of first reduction to practice.

(The foregoing interrogatory may be suitable in a patent case and was allowed in *Chandler v. Cutler-Hammer Inc.* (D. C.-Wis.), 31 Fed. Supp. 453.)

8. Describe in detail the structure used by the defendant for the purpose of —, and submit a blueprint or drawing thereof.

(The foregoing interrogatory may be addressed to a defendant in a patent case.)

9. State whether defendant has sold or offered for sale any devices bearing the label referred to in the complaint, and if the answer is in

the affirmative, state the period during which they were offered for sale and the number sold during such period.

(The foregoing interrogatory may be suitable in a trade-mark case.)

Date ____.

Attorney for ____.

Address.

Note.

These interrogatories are supplemental to those in Form 455, p. 261 of parent volume.

466. Motion for Production of Documents Under Rule 34.

Section 3. Production of Documents

Note.

The allegation of materiality in the last paragraph of this Form in parent volume no longer required in view of the amendment to Rule 34.

The advisory committee's note to amend Rule 34 read, see p. 230, this supplement.

"The changes in clauses (1) and (2) correlate the scope of inquiry in Rule 26(b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co. v. Socony-Vacuum Oil Co.*, E. D. Wis. 1944, 8 Fed. Rules Serv. 34.41, Case 2, " * * * Rule 24 is a direct and simple method of discovery.' At the same time the addition of the words following the term 'parties' makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30(b). This change should be considered in the light of the proposed expansion of Rule 30(b).

"An objection has been made that the word 'designated' in Rule 34 has been construed with undue strictness in some

district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of 'designated' as required specificity has already been delineated by the Supreme Court. See *Brown v. United States*, 1928, 276 U. S. 134, 143, 48 S. Ct. 288 ('The subpoena * * * specifies * * * with reasonable particularity the subjects to which the documents called for related.');

Consolidated Rendering Co. v. Vermont, 1908, 207 U. S. 541, 543-544, 28 S. Ct. 178 ('We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.')."

SECTION 4—PHYSICAL EXAMINATIONS

Form

471A. Motion for physical examination to determine paternity.

471A. Motion for Physical Examination to Determine Paternity.

(Caption.)

The plaintiff moves the court for an order directing that the defendant and her child XY submit to a physical examination by a physician designated by the court for the purpose of a blood-grouping test, in order that a comparison of their blood with plaintiff's blood may be made. The ground of this motion is that one of the issues in this action is whether

the plaintiff is the father of the defendant's child XY, the plaintiff denying paternity and the defendant asserting it; and the proposed blood tests will constitute material evidence on this issue.

Date ____.

Attorney for plaintiff.

Address.

Source of Form.

Beach v. Beach, 72 App. D. C. 318,
114 Fed. (2d) 479.

SECTION 5—REQUESTS FOR ADMISSIONS

Form

480A. Motion for leave to serve a request for admissions.

Form

484. Reply to request for admissions.
485. Objections to request for admissions.

477. Request for Admission under Rule 36.

Plaintiff A. B. requests defendant C. D. within _____ days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed:

Attorney for plaintiff.

Address.

Source of Form.

Federal Rules of Civil Procedure, Appendix of Forms. Form 25 [477] has been amended to include a provision for the designation of a time limit within which to comply with the request. Under Rule 36 as amended such a period must be fixed in the request, extending for any length of time desired "not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice."

Cross-Reference.

Admission of facts and of genuineness of documents; rule 36, this Supplement.

Note of Advisory Committee to Rule 36(a):

"The first change in the first sentence of Rule 36(a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26(a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36(a) give the party whose admissions are requested adequate protection.

"The second change in the first sentence of the rule removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant

documents described in and exhibited with the request. In *Smyth v. Kaufman*, C. C. A. 2d, 1940, 114 Fed. (2d) 40, it was held that the word 'therein,' now stricken from the rule, referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

"The substitution of the word 'served' for 'delivered' in the third sentence of the amended rule is in conformance with the use of the word 'serve' elsewhere in the rule and generally throughout the rules. See also Notes to Rule 13(a) and 33 herein. The substitution of 'shorter or longer' for 'further' will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

"The addition of clause (2) specifies the method by which a party may chal-

lenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, *Methods of Objecting to Notice to Admit*, 1942, 5 Fed. Rules Serv. 835; *International Carbonic Engineering Co. v. Natural Carbonic Products, Inc.*, S. D. Cal. 1944, 57 Fed. Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

"The first of the added last two sentences prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar proposed change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes from Rule 8(b)."

NOTES TO DECISIONS

Request for Admission.

Costs may not be taxed against a defendant who refuses to admit facts which are not a part of the plaintiff's prima facie case. *Fidelity Trust Co. v. Stickney* (C. C. A. 7), 129 Fed. (2d) 506.

A request for admission of a conclusion of law rather than of facts is improper and may be refused. *Fidelity Trust Co. v. Stickney* (C. C. A. 7), 129 Fed. (2d) 506.

Failure to answer request for admission admits the matters in question, and a later contention on appeal that the request was not proper is without merit. *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.* (C. C. A. 7), 131 Fed. (2d) 809.

This rule is not self-executing, and if one would take advantage of its provi-

sions all the facts necessary to invoke the consequences must be made in some way to appear. *Gilbert v. General Motors Corp.* (C. C. A. 2), 133 Fed. (2d) 997.

A motion to strike does not lie to test the sufficiency of a response to a request for admission of facts but only when such response contains scandalous or other objectionable matter. *Momand v. Paramount Pictures Distributing Co., Inc.* (D. C.-Mass.), 36 Fed. Supp. 568.

Summary judgment may be granted against a party who fails to respond to a request for admission of facts which prove his adversary's case. *Merriman v. Broderick* (D. C.-R. I.), 38 Fed. Supp. 13.

480A. Motion for Leave to Serve a Request for Admissions.

Plaintiff, A.B., moves the court for leave to serve upon the defendant, C.D., the annexed written request for the admission by the said defendant (of the genuineness of the documents therein described and exhibited) (of the truth of the matters of fact set forth therein).

Attorney for plaintiff, A.B.

Address.

Note.

This motion may be made with or without notice. See notes to Form 477.

484. Reply to Request for Admissions.

(Caption.)

The defendant replies to the request for admissions, dated ———, 19—, as follows:

1. Admits the genuineness of the documents described in paragraphs — and — of the request.
2. Denies the genuineness of the documents described in paragraphs — and — of the request.
3. Admits the truth of the statements of fact contained in paragraphs — and — of the request.
4. Denies the truth of the statements of fact contained in paragraphs — and — of the request.

C.D., defendant.

Cross-Reference.

See notes to Form 477, this Supplement.

485. Objections to Request for Admissions.

(Caption.)

Defendant objects to the matters set forth in paragraphs — and — of plaintiff's request for admissions dated ———, 19—, on the ground that they are privileged in that they relate to confidential communications between (here insert) and to the matters set forth in paragraphs — and — of said request for admissions on the ground that they are irrelevant to any of the issues in this action in that (here insert).

Attorney for defendant.

Address.

Notice of Hearing

To _____
 Attorney for plaintiff.

Address.

Please take notice, that the undersigned will bring the above objections to request for admissions on for hearing before this court in Room ———, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the — day of ———, 19—, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Attorney for defendant.

Address.

Cross-Reference.

See notes to Form 477, this Supplement.

Source of Form.

The foregoing practice was approved in *Sulzbacher v. Travelers Ins. Co.* (D. C.-Mo.), 2 Fed. R. Dec. 491, and in *Booth Fisheries Corp. v. General Foods*

Corp. (D. C.-Del.), 27 Fed. Supp. 268. It was disapproved in *Nakrasoff v. United States Rubber Co.* (D. C.-N. Y.), 27 Fed. Supp. 953; *Modern Food Process Co., Inc. v. Chester Packing & Provision Co., Inc.* (D. C.-Pa.), 30 Fed. Supp. 520, on the ground that Rule 36 (p. 919 of parent volume) operates extrajudicially.

CHAPTER 17—TRIALS**SECTION 2—DISMISSAL OF ACTIONS****528. Notice of Voluntary Dismissal.**

(Caption.)

To _____

Attorney for defendant.

Address.

Please take notice that this action is hereby dismissed.

Date _____.

Attorney for plaintiff.

Address.

Note.

Amended Rule 41 (a) (1) provides that the plaintiff may file a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs.

The Advisory Committee's note to amended Rule 41(a) read:

"The insertion of the reference to Rule 66 correlates Rule 41(a) (1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

"The change in Rule 41(a) (1) (i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission

of reference to a motion for summary judgment in the original rule was subject to criticism. 3 Moore's Federal Practice, 1938, 3037-3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

"The word 'generally' has been stricken from Rule 41(a) (1) (ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12(b)."

529. Stipulation of Dismissal.

(Caption.)

The undersigned being all of the parties who have appeared herein, hereby stipulate that this action be dismissed without costs to either party.

Date_____.

Cross-Reference.

See notes to Form 528.

530. Notice of Motion for Voluntary Dismissal by Order of Court.**Note.**

The note to Form 530 in parent volume has been rendered inaccurate by virtue

of the amendment of Rule 41(a) (1) (i). See note to Form 528.

SECTION 3—CONSOLIDATION OF ACTIONS**Form**

552. Motion to consolidate for trial of issue.

553. Order to consolidate for trial of issue.

553A. Motion for separate trial—Defense of statute of limitations.

Form

553B. Motion for separate trial—Question as to Whether Engaged in Interstate Commerce.

553C. Motion for separate trial—Defense of release.

552. Motion to Consolidate for Trial of Issue.

United States District Court

_____ District of _____

AB,

Plaintiff,

v.

XY,

Defendant.]

CD,

Plaintiff,

v.

XY,

Defendant.]

EF,

Plaintiff,

v.

XY,

Defendant.]

The defendant moves that the above-entitled causes be consolidated for the purpose of determining the issue of defendant's mental capacity to enter into a contract at the times when the contracts referred to in the complaints are alleged to have been made. The ground of this motion is as follows: Each action is brought against the same defendant on a

contract alleged to have been entered into between the plaintiff and the defendant. The several contracts are claimed to have been made between ———, 19—, and ———, 19—. In each action the defendant pleaded the defense of insanity and mental incapacity to enter into a contract. The issue of insanity is common to all of said actions and if determined in favor of defendant will dispose of all of said actions.

Date ———.

Attorney for plaintiff.

Address.

Source of Form.

Hotel George V v. McLean (D. C.-
D. C.), 1 Fed. R. Dec. 241.

553. Order to Consolidate for Trial of Issue.

United States District Court

———— District of ———

| | | | |
|-----|----|------------|---|
| AB, | | Plaintiff, | } |
| | v. | | |
| XY, | | Defendant. | } |
| | | | |
| CD, | | Plaintiff, | } |
| | v. | | |
| XY. | | Defendant. | } |
| | | | |
| EF, | | Plaintiff, | } |
| | v. | | |
| XY, | | Defendant. | } |
| | | | |

The defendant having moved to consolidate the above-entitled causes for the purpose of determining the issue of defendant's mental capacity to contract, and, it appearing to the court that such consolidation is to the best interests of the parties, it is this ——— day of ———, 19—,

Ordered, that the said causes be consolidated for trial upon the following issues:

1. Was the defendant XY mentally competent to make a contract at all times between ———, 19—, and ———, 19—?

2. If the answer to the foregoing question is "No," was the defendant XY mentally incompetent at all times during the said period or was he competent to make a contract some time or times during said period, and if so when, and particularly on each of the following dates: ———, 19—; ———, 19—; and ———, 19—.

Date ———.

United States district judge.

Source of Form.

Hotel George V v. McLean (D. C.-D. C.), 1 Fed. R. Dec. 241.

NOTES TO DECISIONS

Confession of Judgment.

Rule 42 does not deprive any one of the beneficent provisions of Rule 68 relative to offers to confess judgment. *Cover v. Chicago Eye Shield Co.* (C. C. A. 7), 136 Fed. (2d) 374.

Consolidation.

In a removed action for breach of contract, it is unnecessary to institute a separate action for violation of the anti-trust laws and then consolidate with the removed action, because the claim under the antitrust laws may be added to the removed action by amendment. *Bee Mach. Co., Inc. v. Freeman* (C. C. A. 1), 131 Fed. (2d) 190. *Aff'd.* 319 U. S. 448, 87 L. ed. 1509, 63 Sup. Ct. 1146.

A motion to consolidate twenty actions to cancel citizenship, the complaint in each action alleging similar acts and for which substantially the same evidence will be offered, should be granted. In the trial of such consolidated actions the

trial judge should make separate findings as to each defendant. *United States v. Kuhn* (D. C.-N. Y.), 162 Bull. 53.

Rule 42 confers on the district court broad discretionary powers for consolidation of actions "involving a common question of law or fact." Rule 13(a) should be construed in harmony with it. *Prudential Ins. Co. v. Saxe*, — App. D. C. —, 134 Fed. (2d) 16.

Separate Trials.

Issues should not be tried separately unless necessary to prevent undue delay or hardship. In an action to recover damages to personal property, the issue of liability should be settled first if proof of damages would necessitate testimony of over thirty-five persons, since determination of liability may dispose of the entire controversy. *Rickenbacher Transp., Inc. v. Pennsylvania R. Co.* (D. C.-N. Y.), 163 Bull. 74, 3 Fed. R. Dec. 202.

553A. Motion for Separate Trial—Defense of Statute of Limitations.

(Caption.)

The plaintiff (defendant) moves for a separate trial of the issues raised by the defense of the statute of limitations interposed in the defendant's answer, in advance of trial on the remaining issues, on the following grounds: This action is brought to recover triple damages for violations of the antitrust acts. The evidence will be voluminous and the trial will be protracted. It is, therefore, in the interest of all concerned that the defense of the statute of limitations be determined in advance of a trial of the remaining issues, since if the defense is determined in defendant's favor, the litigation will be disposed of without a trial of the remaining issues.

Date _____.

Attorney for plaintiff (defendant)._____
Address.**Source of Form.**

Seaboard Terminals Corp. v. Standard Oil Co. (D. C.-N. Y.), 30 Fed. Supp. 671.

NOTES TO DECISIONS**Copyright Cases.**

In an action for infringement of copyright, the court may grant a separate and preliminary trial on the issue of whether continuity filed by defendant was a reasonably fair synopsis of defendant's film. *Dellar v. Samuel Goldwyn, Inc.* (D. C.-N. Y.), 40 Fed. Supp. 534.

Patent Cases.

Within its sound discretion the court has a right to order separate trials in issues of validity and infringement in patent suits. *Woburn Degreasing Co. v. Spencer Kellogg & Sons, Inc.* (D. C.-N. Y.), 37 Fed. Supp. 311.

Issues in a patent case should not be separated for trial if to do so would inconvenience the court or prejudice the rights of the parties, and the determination of any one issue would not dispose of the entire litigation. The granting of a motion for a separate trial of the issues in an original complaint in a patent case from those raised in a supplemental complaint would defeat the purpose of supplemental pleading. *Conmar Products Corp. v. Lamar Slide Fastener Corp.* (D. C.-N. Y.), 163 Bull. 76, 50 Fed. Supp. 1019.

Plaintiff's Right to Apply for Separate Trial.

A separate trial may be granted on an application made by plaintiff. *Seaboard*

Terminals Corp. v. Standard Oil Co. (D. C.-N. Y.), 30 Fed. Supp. 671; *Society of European Stage Authors & Composers, Inc. v. WCAU Broadcasting Co.* (D. C.-Pa.), 35 Fed. Supp. 460.

Separate Judgments.

Where receiver of an insurance company filed separate claim to assets deposited in Iowa, separate judgment was proper. *Lydick v. Fischer* (C. C. A. 5), 135 Fed. (2d) 983.

Statute of Limitations.

Where the trial of the cause may be complicated and protracted, since a determination of the issue of statute of limitations may end the entire litigation, the court may in its discretion, grant a separate trial of that issue. *Seaboard Terminals Corp. v. Standard Oil Co.* (D. C.-N. Y.), 30 Fed. Supp. 671; *Momand v. Paramount Pictures Distributing Co., Inc.* (D. C.-Mass.), 36 Fed. Supp. 568.

Venue of Action in Question.

Where suit is brought in a district other than that in which the venue was fixed by contract, the validity of the contract, when attacked on the ground of fraud, should be first determined. *Clark v. Lowden* (D. C.-Minn.), 48 Fed. Supp. 261.

553B. Motion for Separate Trial—Question as to Whether Engaged in Interstate Commerce.**(Caption.)**

The defendant moves for a separate trial, in advance of a trial of the remaining issues, on the question whether the plaintiff was engaged in interstate commerce at the time of the injury referred to in the complaint, on the following grounds:

This action is brought under the Federal Employers' Liability Act by a railroad employee against his employer to recover damages for personal

injuries alleged to have been sustained by reason of defendant's negligence. As a prerequisite to a recovery, plaintiff must establish that he was engaged in interstate commerce when he sustained the personal injuries complained of. This is denied by defendant. This issue is separate and distinct from the issues of negligence and amount of damages. A determination in defendant's favor will dispose of the litigation without a trial of the remaining issues.

Date —.

Attorney for defendant.

Source of Form.

Ermin v. Pennsylvania R. Co. (D. C.-
N. Y.), 36 Fed. Supp. 936.

Address.

553C. Motion for Separate Trial—Defense of Release.

(Caption.)

The defendant moves for a separate trial in advance of a trial of the remaining issues in this action in respect to the issues raised by the defense of release, and the reply that the release was obtained by fraud and duress.

This action is brought to recover damages for personal injuries claimed to have been caused by defendant's alleged negligence. The issues raised by the defense of release and the reply thereto are separate and distinct from the other issues and involve different evidence. A determination of these issues in defendant's favor will render a trial of the remaining issues unnecessary and will finally dispose of this litigation.

Date —.

Attorney for defendant.

Source of Form.

Bedser v. Horton Motor Lines, Inc.
(C. C. A. 4), 122 Fed. (2d) 406.

Address.

SECTION 4—SUBPOENAS

556. Notice of Motion to Quash or Modify Subpoena for Production of Documents.

(Caption.)

To _____
Attorney for plaintiff.

Address.

Please take notice that on — —, 19—, at 10:30 A.M., or as soon thereafter as counsel can be heard, defendant will move this court at

_____, for an order (quashing) (modifying) the subpoena for the production of documents heretofore served on defendant and dated _____, 19____, on the ground that said subpoena is unreasonable and oppressive in that _____.

Date_____.

Attorney for defendant.

Address.

Cross-Reference.

Subpoena for production of documentary evidence, see Rule 45(b), this Supplement, p. 231.

Note of Advisory Committee to Rule 45 (b).

"The added words, 'or tangible things' in subdivision (b) merely make the rule

for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions.

"The insertion of the words 'or modify' in clause (1) affords desirable flexibility."

559. Notice of Motion for Issuance of a Subpoena for the Production of Documentary Evidence on Taking of a Deposition [Obsolete].

560. Order for Issuance of a Subpoena for the Production of Documentary Evidence on the Taking of a Deposition [Obsolete].

Note.

Forms 559 and 560 in parent volume rendered obsolete by amendment of Rule 45(d) (1), see amended rule, this Supplement, p. 231.

The Advisory Committee's note to amended Rule 45(d) (1) read:

"The added last sentence of amended subdivision (d) (1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26(b), thus promoting uniformity. The requirement in the last sentence of original Rule 45(d) (1)—to the effect that leave of court should be obtained for the issuance of such a subpoena—has been omitted. This requirement is unnecessary and oppressive on both

counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45(a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30(b) or Rule 45(b). See Application of Zenith Radio Corp., E.D.Pa.1941, 4 Fed.Rules Serv. 30b.21, Case 1, 1 F.R.D. 627; Fox v. House, E.D.Okla.1939, 29 F.Supp. 673; United States of America for the Use of Tilo Roofing Co., Inc. v. J. Slotnik Co., D.Conn.1944, 3 F.R.D. 408."

SECTION 5—VERDICT AND FINDINGS

Form

566A. Motion for judgment notwithstanding the verdict and, in the alternative, for a new trial.

568A. Order granting new trial on part of issues.

Form

568B. Order denying new trial on condition of remittitur.

570A. Order on motion for judgment notwithstanding the verdict or, in the alternative, for a new trial.

566A. Motion for Judgment Notwithstanding the Verdict and, in the Alternative, for a New Trial.

(Caption.)

The plaintiff (defendant) moves to set aside the verdict (and judgment) herein, and to have judgment entered in accordance with his motion for a directed verdict, on the following grounds:

1. The court erred in denying plaintiff's (defendant's) motion for a directed verdict.

2. There was no substantial evidence to sustain the verdict.

In the alternative, the plaintiff (defendant) moves to set aside the verdict and judgment herein and for a new trial, on the following grounds:

1. The court erred in denying plaintiff's (defendant's) motion for a directed verdict.

2. There was no substantial evidence to sustain the verdict.

3. The amount of the damages awarded by the jury is grossly excessive.

4. The court erred in overruling plaintiff's (defendant's) objections to the evidence, to wit: [Here insert].

5. The court erred in sustaining defendant's (plaintiff's) objections to evidence, to wit: [Here insert].

6. The court erred in instructing the jury, to wit: [Here insert].

7. The court erred in refusing to give instructions to the jury requested by plaintiff (defendant), to wit: [Here insert].

8. The court erred in denying plaintiff's (defendant's) motion for a mistrial.

9. The court erred in overruling plaintiff's (defendant's) challenges of jurors for cause.

10. The remarks made by defendant's (plaintiff's) counsel to the jury were irrelevant and prejudicial, depriving plaintiff (defendant) of a fair and impartial trial, to wit: [Here insert].

11. The plaintiff (defendant) was deprived of a fair and impartial trial by reason of [Here insert].

Date ____.

Attorney for plaintiff (defendant).

Address.

568A. Order Granting New Trial on Part of Issues.

(Caption.)

This cause was heard on plaintiff's motion to set aside the verdict as grossly inadequate and for a new trial, and the court being fully advised, it is

Ordered, that the verdict heretofore rendered herein be set aside as grossly inadequate and a new trial is hereby granted solely as to issue

of the amount of damages to be recovered by the plaintiff against the defendant; and it is further

Ordered, that at the new trial hereby granted, the plaintiff be deemed entitled to recover on the ground that the damages sustained by him were caused by defendant's negligence and the plaintiff was free from contributory negligence.

Date ____.

United States district judge.

Source of Form.

Chesevski v. Strawbridge & Clothier
(D. C.-N. J.), 25 Fed. Supp. 325. See

also *Tompkins v. Pilots' Assn.* (D. C.-Pa.), 32 Fed. Supp. 439.

NOTES TO DECISIONS

Errors Occurring at Trial.

The denial of a motion for a new trial based on a juror's affidavit attempting to show mistake of evidence and misapprehension of law is discretionary with the trial court, and will not be reversed on appeal. *Bateman v. Donovan* (C. C. A. 9), 131 Fed. (2d) 759.

Error that does not affect the substantial rights of a party is not ground for granting a motion for a new trial. *Alcaro v. Jean Jordeau, Inc.* (D. C.-N. J.), 3 Fed. R. Dec. 61.

Motion for Rehearing.

Motion for rehearing must be considered as addressed to the exercise of the power of the trial court under Rule 59, which is applicable to what were formerly petitions for rehearing in equity. *Safeway Stores, Inc. v. Coe*, — App. D. C. —, 136 Fed. (2d) 771.

Newly-Discovered Evidence.

A motion for new trial because of newly-discovered evidence must allege previous diligence to learn about such evidence. *Colonial Book Co., Inc. v. Amsco School Publications, Inc.* (D. C.-N. Y.), 48 Fed. Supp. 794.

Order Granting New Trial.

An order granting a new trial after verdict and judgment may be set aside if erroneously granted even after expiration of the term of court, since such an order is interlocutory and leaves the case undisposed of. The granting or refusing of a new trial is discretionary with the trial court and will be reviewed only for a clear abuse of authority. *Bateman v. Donovan* (C. C. A. 9), 131 Fed. (2d) 759.

In an action to compel distribution of proceeds of a life insurance policy in which the parties stipulated that the fund had not been distributed, a motion for rehearing by defendant to modify the decree as to plaintiff's share which set out distribution to all other parties contrary to the stipulated facts was denied. A party is not entitled to a rehearing to establish a fact contrary to that stipulated by all parties in interest. *Reed v. Hardt* (D. C.-Pa.), 164 Bull. 98.

A court may grant a new trial for reasons wholly different from those advanced in a motion for a new trial, but the time within which a court may act on its own initiative may not be extended. The determination of a jury should not be set aside in granting a new trial, except under unusual circumstances. The granting of a new trial limited to the amount of damages after striking from the record motion for a new trial is on the initiative of the court. *Freid v. McGrath*, 76 App. D. C. 388, 133 Fed. (2d) 350.

Setting Aside Judgment.

Under Rule 59 the trial judge in his discretion may set aside a judgment for "mistake, inadvertence, surprise, or excusable neglect." *Westmoreland Asbestos Co., Inc. v. Johns-Manville Corp.* (C. C. A. 2), 136 Fed. (2d) 844.

Suspension of Appeal Time.

The time for taking an appeal is suspended by a seasonably filed motion for new trial or petition for rehearing. *Safeway Stores, Inc. v. Coe*, — App. D. C. —, 136 Fed. (2d) 771.

568B. Order Denying New Trial on Condition of Remittitur.

(Caption.)

This cause was heard on defendant's motion to set aside the verdict and for a new trial, and the court being of the opinion that the amount of the verdict rendered herein was excessive, it is

Ordered, that the motion to set aside the verdict and for a new trial be denied, on condition that within — days the plaintiff stipulate that the amount of the verdict be reduced to — dollars (\$—); and it is further

Ordered, that in the event that the plaintiff fails to make the foregoing stipulation, the verdict be set aside and a new trial granted.

Date —.

United States district judge.

Source of Form.

Sykes v. Bensinger Recreation Corp.
(D. C.-Wis.), 39 Fed. Supp. 952.

570A. Order on Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial.

(Caption.)

This action was heard on plaintiff's (defendant's) motion to set aside the verdict (and judgment) herein, and to have judgment entered in accordance with his motion for a directed verdict, or, in the alternative, for a new trial, and the court being fully advised, it is

Ordered, that the motion to set aside the verdict (and judgment) and for judgment in accordance with plaintiff's (defendant's) motion for a directed verdict be denied; and it is further

Ordered, that the motion to set aside the verdict (and judgment) and for a new trial be denied.

OR

Ordered, that the motion to set aside the verdict (and judgment) and for judgment in accordance with plaintiff's (defendant's) motion for a directed verdict be denied; and, it is further

Ordered, that the motion to set aside the verdict (and judgment) and for a new trial be granted.

OR

Ordered, that the motion to set aside the verdict (and judgment) and for judgment in accordance with plaintiff's (defendant's) motion for a directed verdict be granted, and that judgment be entered for the plaintiff: (defendant) for the sum of — dollars (\$—) (dismissing the action) with costs; and it is further

Ordered, that, in the alternative, the motion to set aside the verdict (and judgment) and for a new trial, be granted.

OR

Ordered, that the motion to set aside the verdict (and judgment) and for judgment in accordance with plaintiff's (defendant's) motion for a directed verdict be granted, and that judgment be entered for the plaintiff (defendant) for the sum of — dollars (\$—) (dismissing the action) with costs; and it is further

Ordered, that, in the alternative, the motion to set aside the verdict (and judgment) and for a new trial, be denied.

Date —.

United States district judge.

Note.

Form 570, p. 339 of parent volume, must be deemed obsolete, and Form 570A of this supplement to have superseded it, in the light of *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 85 L. ed. 147, 61 Sup. Ct. 189, which held that if a motion is made for judgment notwithstanding the verdict or in the alternative

for a new trial, the court should rule separately on each branch of the motion, in order that if the appellate court reverses the decision on the motion for judgment n. o. v., the respondent may have the benefit of securing a disposition of his alternative motion for a new trial.

NOTES TO DECISIONS

Judgment Non Obstante Verdicto.

A judgment non obstante verdicto may be granted only upon grounds which would sustain a motion for a directed verdict. *Dickerson v. Franklin Nat. Ins. Co.* (C. C. A. 4), 130 Fed. (2d) 35.

Motion for Directed Verdict.

On a motion for a directed verdict by defendant, evidence is to be construed in the light most favorable to the plaintiff.

Dickerson v. Franklin Nat. Ins. Co. (C. C. A. 4), 130 Fed. (2d) 35.

If the court reserves decision on a motion for a directed verdict and submits the case to the jury and the jury fails to agree, the moving party may thereupon move for judgment in accordance with the motion for a directed verdict. *Fletcher v. Agar Mfg. Corp.* (D. C. Mo.), 45 Fed. Supp. 650.

572. Findings of Fact and Conclusions of Law.

Note.

Amended Rule 52(a) requires the court to find the facts specially and state separately its conclusions of law thereon in all actions tried upon the facts with an advisory jury or without a jury. Form 572 in parent volume therefore continues applicable by substituting "with an advisory jury" for "without a jury" when appropriate.

The Advisory Committee's note to amended Rule 52(a) read:

"The amended rule makes clear that the requirements for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 Moore's Federal Practice, 1938, 3119. *Hurwitz v. Hurwitz*, App.D.C.1943, 78 U.S.App.D.C. 66, 136 F.2d 796.

"The two sentences added at the end of Rule 52(a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See e. g., *United States v. One 1941 Ford Sedan*, S.D.Tex. 1946, 65 F.Supp. 84. Under original Rule 52(a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc. v. Bruns Publications*, S.D.N.Y.1939, 28 F. Supp. 399; *Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Cincinnati & L. E. R. Co.*, S.D.Ohio 1941, 43 F.Supp. 5; *United States v. Aluminum Co. of America*, S.D.N.Y. 1941, 2 F.R.D. 224, 5 Fed.Rules Serv. 52a.11, Case 3; see also s.c., 44 F.Supp. 97. But, to the contrary, see *Wellman v. United States*, D.Mass.1938, 25 F.

Supp. 868; Cook v. United States, D. Mass.1939, 26 F.Supp. 253; Proctor v. White, D.Mass.1939, 28 F.Supp. 161; Green Valley Creamery, Inc., v. United States, C.C.A.1st, 1939, 108 F.2d 342. See also Matton Oil Transfer Corp. v. The Dynamic, C.C.A.2d 1941, 123 F.2d 999; Carter Coal Co. v. Litz, C.C.A.4th, 1944, 140 F.2d 934; Woodruff v. Heiser, C.C.A.10th, 1945, 150 F.2d 869; Coca Cola Co. v. Busch, E.D.Pa.1943, 7 Fed. Rules Serv. 59b.2, Case 4; Oglebay, Some Developments in Bankruptcy Law, 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, Hurwitz v. Hurwitz, App.D.C. 1943, 78 U.S.App.D.C. 66, 136 F.2d 796, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, Improvements in Statements of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 26-27; United States v. Forness, C.C.A.2d, 1942, 125 F.2d 928, cert. den., 1942, 316 U.S. 694, 62 S.Ct. 1293. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. United States v. Forness, supra; United States v. Crescent Amusement Co., 1944, 323 U.S. 173, 65 S.Ct. 254. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. Matton

Oil Transfer Corp. v. The Dynamic, supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. United States v. Forness, supra; United States v. Crescent Amusement Co., supra. See also Petterson Lighterage & Towing Corp. v. New York Central R. Co., C.C.A.2d, 1942, 126 F.2d 992; Brown Paper Mill Co., Inc. v. Irwin, C.C.A.8th, 1943, 134 F.2d 337; Allen Bradley Co. v. Local Union No. 3, I. B. E. W., C.C.A.2d, 1944, 145 F.2d 215, rev'd on other grounds, 1945, 325 U.S. 797, 65 S.Ct. 1533; Young v. Murphy, N.D.Ohio 1946, 9 Fed. Rules Serv. 52a.11, Case 2.

"The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see Thomas v. Peyser, App. D.C.1941, 118 F.2d 369; Schad v. Twentieth Century-Fox Corp., C.C.A.3d, 1943, 136 F.2d 991; Prudential Ins. Co. of America v. Goldstein, E.D.N.Y.1942, 43 F.Supp. 767; Somers Coal Co. v. United States, N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co., E.D.Ky.1942, 2 F.R.D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, Necessity of Findings of Fact, 1941, 4 Fed. Rules Serv. 936."

CHAPTER 18A—OFFER OF JUDGMENT

Form

603. Offer of judgment.
604. Notice of acceptance of offer.

Form

605. Judgment on offer.

603. Offer of Judgment.

(Caption.)

To _____
Attorney for plaintiff.

Address.

The defendant hereby offers to allow judgment to be taken against him in the above-entitled action for the sum of _____ dollars (\$_____), with costs accrued to date. This offer of judgment is made pursuant to Rule 68 of the Federal Rules of Civil Procedure and subject to the limitations of said rule (see page 236 of this supplement).

OR

Ordered, that the motion to set aside the verdict (and judgment) and for judgment in accordance with plaintiff's (defendant's) motion for a directed verdict be granted, and that judgment be entered for the plaintiff (defendant) for the sum of — dollars (\$—) (dismissing the action) with costs; and it is further

Ordered, that, in the alternative, the motion to set aside the verdict (and judgment) and for a new trial, be denied.

Date —.

United States District judge.

Note.

Form 570, p. 339 of parent volume, must be deemed obsolete, and Form 570A of this supplement to have superseded it, in the light of *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 85 L. ed. 147, 61 Sup. Ct. 189, which held that if a motion is made for judgment notwithstanding the verdict or in the alternative

for a new trial, the court should rule separately on each branch of the motion, in order that if the appellate court reverses the decision on the motion for judgment n. o. v., the respondent may have the benefit of securing a disposition of his alternative motion for a new trial.

NOTES TO DECISIONS

Judgment Non Obstante Veredicto.

A judgment non obstante veredicto may be granted only upon grounds which would sustain a motion for a directed verdict. *Dickerson v. Franklin Nat. Ins. Co.* (C. C. A. 4), 130 Fed. (2d) 35.

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On a motion for a directed verdict by defendant, evidence is to be construed in the light most favorable to the plaintiff.

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If the court reserves decision on a motion for a directed verdict and submits the case to the jury and the jury fails to agree, the moving party may thereupon move for judgment in accordance with the motion for a directed verdict. *Fletcher v. Agar Mfg. Corp.* (D. C. Mo.), 45 Fed. Supp. 650.

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Supp. 868; Cook v. United States, D. Mass.1939, 26 F.Supp. 253; Proctor v. White, D.Mass.1939, 28 F.Supp. 161; Green Valley Creamery, Inc., v. United States, C.C.A.1st, 1939, 108 F.2d 342. See also Matton Oil Transfer Corp. v. The Dynamic, C.C.A.2d 1941, 123 F.2d 999; Carter Coal Co. v. Litz, C.C.A.4th, 1944, 140 F.2d 934; Woodruff v. Heiser, C.C.A.10th, 1945, 150 F.2d 869; Coca Cola Co. v. Busch, E.D.Pa.1943, 7 Fed. Rules Serv. 59b.2, Case 4; Oglebay, Some Developments in Bankruptcy Law, 1944, 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review, Hurwitz v. Hurwitz, App.D.C. 1943, 78 U.S.App.D.C. 66, 136 F.2d 796, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, Improvements in Statements of Findings of Fact and Conclusions of Law, 1 F.R.D. 25, 26-27; United States v. Forness, C.C.A.2d, 1942, 125 F.2d 928, cert. den., 1942, 316 U.S. 694, 62 S.Ct. 1293. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. United States v. Forness, supra; United States v. Crescent Amusement Co., 1944, 323 U.S. 173, 65 S.Ct. 254. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. Matton

Oil Transfer Corp. v. The Dynamic, supra. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. United States v. Forness, supra; United States v. Crescent Amusement Co., supra. See also Petterson Lighterage & Towing Corp. v. New York Central R. Co., C.C.A.2d, 1942, 126 F.2d 992; Brown Paper Mill Co., Inc. v. Irwin, C.C.A.8th, 1943, 134 F.2d 337; Allen Bradley Co. v. Local Union No. 3, I. B. E. W., C.C.A.2d, 1944, 145 F.2d 215, rev'd on other grounds, 1945, 325 U.S. 797, 65 S.Ct. 1533; Young v. Murphy, N.D.Ohio 1946, 9 Fed. Rules Serv. 52a.11, Case 2.

"The last sentence of Rule 52(a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41(b). As so holding, see Thomas v. Peyser, App. D.C.1941, 118 F.2d 369; Schad v. Twentieth Century-Fox Corp., C.C.A.3d, 1943, 136 F.2d 991; Prudential Ins. Co. of America v. Goldstein, E.D.N.Y.1942, 43 F.Supp. 767; Somers Coal Co. v. United States, N.D.Ohio 1942, 2 F.R.D. 532, 6 Fed.Rules Serv. 52a.1, Case 1; Pen-Ken Oil & Gas Corp. v. Warfield Natural Gas Co., E.D.Ky.1942, 2 F.R.D. 355, 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, Necessity of Findings of Fact, 1941, 4 Fed. Rules Serv. 936."

CHAPTER 18A—OFFER OF JUDGMENT

Form

603. Offer of judgment.
604. Notice of acceptance of offer.

Form

605. Judgment on offer.

603. Offer of Judgment.

(Caption.)

To _____
Attorney for plaintiff.

Address.

The defendant hereby offers to allow judgment to be taken against him in the above-entitled action for the sum of _____ dollars (\$_____), with costs accrued to date. This offer of judgment is made pursuant to Rule 68 of the Federal Rules of Civil Procedure and subject to the limitations of said rule (see page 236 of this supplement).

Date ____.

Attorney for defendant._____
Address.**604. Notice of Acceptance of Offer.**

(Caption.)

To _____
Attorney for defendant._____
Address.

You are hereby notified that the offer of judgment served by you on the undersigned on ____ —, 19—, is accepted.

Date ____.

Attorney for plaintiff._____
Address.**605. Judgment on Offer.**

(Caption.)

The defendant herein having served an offer to allow judgment to be taken against him for the sum of ____ dollars (\$—), with costs, and the plaintiff having served notice that the offer is accepted, it is

Adjudged, that the plaintiff AB recover of the defendant CD, the sum of ____ dollars (\$—), and costs, amounting to the sum of ____ dollars (\$—), aggregating the sum of ____ dollars (\$—), and that the plaintiff have execution therefor.

Date ____.

Clerk.**Cross-Reference.**

Procedure on offers of judgment is governed by Rule 68 of the Rules of

Civil Procedure, see page 933 of parent volume.

CHAPTER 19—JUDGMENTS

Form

639A. Order refusing review of taxation of costs.

649A. Order for summary judgment—Alternative form.

649B. Order for summary judgment, reserving issue of amount.

649C. Order for partial summary judgment.

649D. Order for summary judgment in copyright suit.

649E. Order for summary judgment for defendant.

Form

649F. Order for partial summary judgment.

658A. Motion for new trial on newly-discovered evidence.

660A. Motion to alter or amend a judgment.

663. Motion to relieve party of judgment.

664. Order relieving party of judgment.

665. Complaint for relief from judgment.

639A. Order Refusing Review of Taxation of Costs.

(Caption.)

Now this — day of —, 19—, after due and careful consideration being given the taxation of costs filed by the clerk of courts in the above entitled case, said action on the part of the clerk of courts is sustained and the motion for review of the taxation of costs filed by the plaintiff is refused, and the motion filed by the defendant for the allowance of the costs incurred for the bonds to perfect the appeal is refused. The bill of costs filed by the plaintiff against the defendant is refused in whole.

United States district judge.**649A. Order for Summary Judgment—Alternative Form.**

(Caption.)

This cause was heard on plaintiff's motion for a summary judgment, and the court having considered the motion, the pleadings and affidavits, it is

Ordered, that summary judgment be entered for the plaintiff against the defendant for the sum of — dollars (\$—), with interest from — —, 19—, and costs.

Date —.

United States district judge.**NOTES TO DECISIONS****Affidavits and Papers Considered.**

In an action under the Emergency Price Control Act of 1942 (11 F. C. A., Title 50, Appx. 25; U. S. C. A., Title 50, Appx. § 901 et seq.; id. U. S. C.) to restrain defendant from dealing in scrap metal except at certain prices, a motion for summary judgment was denied because the affidavits of the parties disclose a genuine issue of fact as to the classification of the scrap. *Henderson v. Glosser* (D. C.-Pa.), 46 Fed. Supp. 453.

Summary judgment on supporting affidavits should not be granted a defendant if the record discloses any basis for a claim in plaintiffs. *Veatch v. Standard Oil Co.* (D. C.-N. Y.), 49 Fed. Supp. 45.

The function of a motion for summary judgment is to obtain a preliminary analysis and evaluation of the evidence to determine if there are issues of fact to be tried. In the absence of counter-affidavits denying defendant's affidavits accompanying his motion for summary judgment, the facts contained therein must be accepted as undisputed and true. Affidavits filed in connection with a

motion for summary judgment must present evidence, and hearsay statements in affidavits must be disregarded. *Seward v. Nissen* (D. C.-Del.), 2 Fed. R. Dec. 545.

Supporting affidavits are not required in support of a motion for summary judgment, if no genuine issues of fact are raised. *Reynolds v. Needle*, — App. D. C. —, 132 Fed. (2d) 161.

In considering a motion for summary judgment, the court may judicially notice its own records, other related cases, and questions of a related nature between the same parties. *Fletcher v. Evening Star Newspaper Co.*, — App. D. C. —, 133 Fed. (2d) 395.

Contracts, Actions On.

Summary judgment was improper in action to recover upon employment contract where there was a material issue as to services performed under the contract. *Acadian Production Corp. v. Land* (C. C. A. 5), 136 Fed. (2d) 1.

A motion for summary judgment may

mined involves the construction of a written agreement which is set out in full in the complaint, since the question is one of law. *Noel v. Baskin*, 76 App. D. C. 332, 131 Fed. (2d) 231.

Labor Cases.

Defendant's motion for summary judgment in an action under the Fair Labor Standards Act (9 F. C. A., Title 29, § 201 et seq.; U. S. C. A., Title 29, § 201 et seq.; id. U. S. C.) should be granted if it appears that plaintiff is an employee exempted from the operation of the act. *Johnson v. Johnson & Co., Inc.* (D. C.-Ga.), 47 Fed. Supp. 650.

In a suit by an employee to recover overtime wages under the Fair Labor Standards Act (9 F. C. A., Title 29, § 201 et seq.; U. S. C. A., Title 29, § 201 et seq.; id. U. S. C.), a motion of defendant for summary judgment, which was supported by affidavit showing that duration of plaintiff's employment and nature of his duties were as alleged in answer, was sufficient to establish such facts, where plaintiff filed no opposing affidavit. *Wolfe v. Union Transfer & Storage Co.* (D. C.-Ky.), 48 Fed. Supp. 855.

In an action under the Fair Labor Standards Act (9 F. C. A., Title 29, § 201 et seq.; U. S. C. A., Title 29, § 201 et seq., id. U. S. C.) defendant's motion to dismiss on the grounds that its business is retail and that plaintiffs are not such employees as come under the act, will be treated as a motion for summary judgment, and as the motion raises triable issues, it will not be granted. *Evans v. Stivers Lbr. Co., Inc.* (D. C.-Tenn.), 2 Fed. R. Dec. 548.

Patent and Copyright Cases.

In an action for patent infringement, whether disclaimers were invalid and resulted in abandonment of the claims in suit, may be decided on a motion for summary judgment. *Milcor Steel Co. v. George A. Fuller Co.* (C. C. A. 2), 122 Fed. (2d) 292. Affd. 316 U. S. 143, 86 L. ed. 1332, 62 Sup. Ct. 969.

In an action for patent infringement, summary judgment for defendant on the issues of validity and infringement should not be granted unless it is clearly apparent that there is no infringement, and the issue of validity, based on prior art, should not be determined on such motion. *Weil v. N. J. Richman Co., Inc.* (D. C.-N. Y.), 34 Fed. Supp. 401; *Kendall Co. v. Earnshaw Knitting Co.* (D. C.-Mass.), 1 Fed. R. Dec. 357.

A motion for summary judgment in a patent case involving an important invention will not be granted if the parties have not agreed on the facts and have not both moved for summary judgment.

E. W. Bliss Co. v. Cold Metal Process Co. (D. C.-Ohio), 47 Fed. Supp. 897.

Summary Judgment Procedure.

The summary judgment procedure provided by Rule 56 may be availed of to bring an action to prompt conclusion when the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Acadian Production Corp. v. Land* (C. C. A. 5), 136 Fed. (2d) 1.

Summary judgment may properly be granted when the ultimate facts are not controverted and there are no genuine issues as to material facts and the only dispute is as to their legal consequences. *Trinity Universal Ins. Co. v. Woody* (D. C.-N. J.), 47 Fed. Supp. 327; *Beall v. Pinckney, Jr.* (C. C. A. 5), 164 Bull. 87.

Supporting Affidavits.

Summary judgment on supporting affidavits should not be granted a defendant if the record discloses any basis for a claim in plaintiffs. *Veatch v. Standard Oil Co.* (D. C.-N. Y.), 49 Fed. Supp. 45.

A motion for summary judgment need not be accompanied by supporting affidavits. *Fletcher v. Evening Star Newspaper Co.*, — App. D. C. —, 133 Fed. (2d) 395.

When Motion Denied.

Upon a motion for summary judgment the court's sole function is to determine whether there is an issue of fact to be tried, and all doubts as to the existence of an issue of fact must be resolved against the moving party. Judgment may be entered if there are no genuine issues of fact and the moving party is entitled to a judgment as a matter of law. It is improper to base summary judgment in part upon the judge's personal knowledge of matters appearing in other cases, such matters not appearing in pleadings presented by the parties. *Toeberman v. Missouri-Kansas Pipe Line Co.* (C. C. A. 3), 130 Fed. (2d) 1016, modg. 41 Fed. Supp. 334.

In an action for breach of contract a motion for summary judgment on grounds of release should not be granted if there is a question of fact as to whether release was conditional. *Schoeler v. Roth* (D. C.-N. Y.), 51 Fed. Supp. 518.

When Motion Granted.

A summary judgment should not be granted unless the facts are clear and undisputed, and if there is a controversy upon any question of fact, there should be a trial of the action upon its merits, but it will be granted if it appears from

the complaint and from affidavits filed in support of the motion that the action is barred by the statute of limitations. *Kissick Constr. Co. v. First Nat. Bank D. C.-Nebr.*, 46 Fed. Supp. 869.

In an action to recover commissions under a sales contract, a partial summary judgment for plaintiff may be granted as to items not under dispute. *Tractor & Equip. Corp. v. Chain Belt Co. (D. C.-N. Y.)*, 50 Fed. Supp. 1001.

Summary judgment should be granted if the only issues presented are issues of law. *Berry v. Spokane, P. & S. R. Co. (D. C.-Ore.)*, 2 Fed. R. Dec. 483.

Summary judgment may be granted if the pleadings and affidavits show that there is no genuine issue as to any material fact. *Ratner v. Paramount Pictures, Inc. (D. C.-N. Y.)*, 155 Bull. 60.

If previous trials and appeals have narrowed the issues in an insurance case to a single one of damage, and that fact was established by affidavits which were not controverted or opposed by any proffered proof, summary judgment should be entered. *Fisher v. Underwriters At Lloyd's, London (C. C. A. 7)*, 162 Bull. 66.

In an action to collect attorney's fees in which defendant raised the defense of the statute of limitations on a motion for summary judgment filed after answer, failure to plead the statute in the answer waived such defense, and therefore it could not later be revived by motion. *Roe v. Sears, Roebuck & Co. (C. C. A. 7)*, 164 Bull. 192.

649B. Order for Summary Judgment, Reserving Issue of Amount.

(Caption.)

This cause was heard on plaintiff's motion for summary judgment, and the court having considered the motion, the pleadings and affidavits, it is

Ordered, that plaintiff is entitled to judgment against the defendant for such amount as may be determined to be due, and it is further

Ordered, that the issue as to the amount due be placed on the calendar for trial.

Date ———.

Source of Form.

Larson v. Holten (D. C.-Minn.), 1 Fed. R. Dec. 109.

United States district judge.

649C. Order for Partial Summary Judgment.

(Caption.)

This cause was heard on plaintiff's motion for summary judgment dismissing the counterclaim of the third-party defendant, and the court having considered the motion, the pleadings and affidavits, it is

Ordered, that summary judgment be entered in favor of the plaintiff AB against the third-party defendant EF, dismissing the counterclaim of said third-party defendant with costs.

Date ———.

Source of Form.

Eastern States Petroleum Co., Inc. v. Asiatic Petroleum Corp. (D. C.-N. Y.), 28 Fed. Supp. 279.

United States district judge.

649D. Order for Summary Judgment in Copyright Suit.

(Caption.)

This cause was heard on plaintiff's motion for summary judgment, and the court having considered the motion, the pleadings and affidavits, it is

Ordered, that summary judgment be entered in favor of plaintiff against the defendant for a permanent injunction as prayed for in the complaint; and it is further

Ordered, that this action be referred to —, Esquire, as special master, to ascertain and report to this court the amount of damages that plaintiff has sustained by reason of the infringement by the defendant of the copyright referred to in the complaint, and to state an account of the profits realized by the defendant by reason of said infringement.

Date —.

United States district judge.**Source of Form.**

Houghton Mifflin Co. v. Stackpole Sons, Inc. (D. C.-N. Y.), 31 Fed. Supp. 517. Mfd. (C. C. A. 2), 113 Fed. (2d) 627.

NOTES TO DECISIONS**Determination.**

In a suit for copyright infringement, summary judgment for permanent injunction should be denied if the validity of an assignment of the copyright to the plaintiff is questioned by the defendant and only the plaintiff has access to the evidence on that issue. *Houghton Mifflin Co. v. Stackpole Sons, Inc.* (C. C. A. 2), 113 Fed. (2d) 627, modg. 31 Fed. Supp. 517.

The granting or withholding of summary judgment in a patent case should not depend upon different principles and considerations than in other civil actions, and in the absence of any genuine issues of fact, the court should decide the case as a matter of law. Defendant's motion for summary judgment accompanied by affidavits will be granted if plaintiff filed no counter-affidavits, but merely relied

on his brief to raise issues of fact. The raising of an issue of fact for the first time in counsel's brief is not contemplated in Rule 56. Plaintiff's failure to file counter-affidavits should be deemed an admission of the facts stated in defendant's affidavits and in the absence of a genuine issue of fact, defendant's motion for summary judgment should be granted. *Allen v. Radio Corp.* (D. C.-Del.), 47 Fed. Supp. 244.

In an action to restrain defendant from representing that the design of plaintiff's product infringes defendant's patent, summary judgment for plaintiff may be granted if an ocular examination demonstrates that plaintiff's design is unlike that of the defendant, since no evidence could change either. *Millburn Mills, Inc. v. Meister* (D. C.-N. Y.), Nov. 23, 1940, 101 Bull. 66.

649E. Order for Summary Judgment for Defendant.

(Caption.)

This cause was heard on defendant's motion for summary judgment, and the court having considered the motion, the pleadings and affidavits, it is

Ordered, that defendant's motion for summary judgment be granted and the complaint be dismissed with costs.

Date —.

United States district judge.

649F. Order for Partial Summary Judgment.

(Caption.)

This cause was heard on plaintiff's motion for summary judgment, and the court having considered the motion, the pleadings and affidavits, it is

Ordered, that summary judgment be granted in favor of the plaintiff AB against the defendant CD for the sum of — dollars (\$—), with costs; and it is further

Ordered, that the cause be retained upon the docket for further proceedings on the third-party complaint of defendant CD against the third-party defendant EF.

Date —.

United States district judge.

Source of Form.

Axton-Fisher Tobacco Co., Inc. v. Ziffrin Truck Lines, Inc. (D. C.-Ky.), 36 Fed. Supp. 777.

Note.

Rule 62(h) now provides for stay of judgment on multiple claims.

The Advisory Committee's note to Rule 62(h) read:

"In proposing to revise Rule 54(b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims."

NOTES TO DECISIONS**When Motion Denied.**

Defendant's motion for summary judgment in an action for commissions, alleging that plaintiff failed to promptly object to statement of account, and that a check offered in settlement of a commission account was retained over four months and therefore amounted to settlement, should not be granted, such a matter presenting an issue of fact. The defense of account stated must be affirmatively pleaded. Unreasonable reten-

tion of a check offered to settle a commission account would not amount to accord and satisfaction of more than the items in the account rendered if it appears that more than one promise to pay was included in the contract, and as issues of fact are involved, defendant's motion for summary judgment should be denied. Tractor & Equip. Corp. v. Chain Belt Co. (D. C.-N. Y.), 50 Fed. Supp. 1001.

658A. Motion for New Trial on Newly-discovered Evidence.

(Caption.)

The plaintiff (defendant) moves for a new trial on newly-discovered evidence, on the following grounds:

The newly-discovered evidence will prove that [here insert]. Said evidence is not cumulative or corroborative of evidence introduced at the trial, but would lead to change in the outcome of the trial, as follows: [here insert].

The said newly-discovered evidence will be given by the following witnesses, as appears more fully from the affidavit of XY sworn to on —, 19—, and hereto annexed, to wit: [Here insert].

The said evidence was discovered on —, 19—, in the following manner, as appears more fully from the aforesaid affidavit: [Here insert].

The said evidence could not be obtained and introduced by the plaintiff (defendant) at the trial with the exercise of due diligence, for the following reasons: [Here insert].

Date _____.

Attorney for plaintiff (defendant).

Address.

NOTES TO DECISIONS

Diligence.

Where a defendant moves for a new trial on the ground of newly-discovered evidence, he must allege diligence to learn about such evidence. *Colonial Book Co., Inc. v. Amsco School Publications, Inc.* (D. C.-N. Y.), 48 Fed. Supp. 794.

A motion for a new trial on the ground of newly-discovered evidence must show facts from which the court may infer reasonable diligence on the part of the movant, and that the evidence was discovered since the trial. *Reed v. Kellerman* (D. C.-Pa.), 2 Fed. R. Dec. 195.

660A. Motion to Alter or Amend a Judgment.

(Caption.)

Defendant moves for an order directing that the judgment entered herein on the — day of _____, 19—, adjudging — —, be amended by striking therefrom — — and inserting in lieu thereof the following — —.

Attorney for defendant.

Address.

(Notice of Motion.)

Cross-Reference.

Motion to alter or amend a judgment, Rule 59(e), this Supplement.

Note of Advisory Committee to Rule 59 (e) read:

"This subdivision has been added to care for a situation such as that arising in *Boaz v. Mutual Life Ins. Co. of New York*, C.C.A.8th, 1944, 146 F.2d 321, and makes clear that the district court possesses the power asserted in that

case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50(b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73(a) and Note.

"The title of Rule 59 has been expanded to indicate the inclusion of this subdivision."

663. Motion to Relieve Party of Judgment.

The defendant (plaintiff) moves this court to relieve him from the judgment (order) entered herein on — —, 19—, on the ground that it was taken against him through his mistake (inadvertence) (surprise) (excusable neglect), in that [here set forth facts showing mistake, inadvertence, surprise, or excusable neglect, as the case may be].

Date —.

Attorney for —.

Address.

Note.

Amended Rule 60(b) provides additional reasons for motion for relief from a final judgment, order, or proceeding.

The Advisory Committee's note to Rule 60(b) read:

"When promulgated, the rules contained a number of provisions, including those found in Rule 60(b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60 (b) of the right to entertain a new action to relieve a party to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, coram nobis, or audita querela, to obtain relief from

final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, *Federal Relief from Civil Judgments*, 1946, 55 Yale L.J. 623. See also 3 Moore's *Federal Practice*, 1938, 3254 et seq.; *Commentary, Effect of Rule 60b on Other Methods of Relief From Judgment*, 1941, 4 Fed. Rules Serv. 942, 945; *Wallace v. United States*, C.C.A.2d, 1944, 142 F.2d 240, cert. den., 1944, 323 U.S. 712, 65 S.Ct. 37."

664. Order Relieving Party of Judgment.

(Caption.)

This action was heard on defendant's (plaintiff's) motion to be relieved of the judgment (order) entered herein on — —, 19—, and it appearing that said judgment (order) was taken against him through his mistake (inadvertence) (surprise) (excusable neglect), it is hereby

Ordered, that the defendant (plaintiff) be relieved of the judgment (order) entered herein on — —, 19—; and it is further

Ordered, that the judgment (order) entered herein — —, 19—, is hereby vacated and set aside; and it is further

Ordered, that as a condition of the foregoing order [here insert].

United States district judge.

665. Complaint for Relief from Judgment.

(Caption.)

1. Allegations of jurisdiction.

2. On — —, 19—, at — the defendant herein recovered a judgment against the plaintiff herein in — Court for the sum of — dollars (\$—) in an action entitled — —.

3. Plaintiff herein satisfied said judgment on the — day of —, 19—, by the payment of the sum of — dollars (\$—) to the defendant herein.

4. In obtaining the said judgment the defendant herein perpetrated a fraud upon the court in that ———.

Wherefore plaintiff herein demands judgment against the defendant herein for the sum of — dollars (\$—), with interest from the — day of ———, 19—, and costs.

Attorney for plaintiff.

Address.

Note.

See note to Form 663, this Supplement.

CHAPTER 21—APPEAL

| Form | | Form | |
|-------|--|-------|---|
| 702. | Motion to extend time for appeal. | | court to the Supreme Court of the United States. |
| 703A. | Motion for leave to appeal in forma pauperis. | 720D. | Statement of points to be relied upon and designation of record of appeal from state court to the Supreme Court of the United States. |
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| 717. | Motion for stay after trial. | 721B. | Order extending time within which to file petition for certiorari. |
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| 720B. | Order allowing appeal from state court to the Supreme Court of the United States. | | |
| 720C. | Stipulation designating parts of record to be included in transcript on appeal from state | | |

SECTION 2—APPEAL TO A UNITED STATES COURT OF APPEALS

Note.

Circuit Courts of Appeals are now known as the United States Courts of Appeals. Title 28 U.S.C., Sec. 43.

702. Motion to Extend Time for Appeal.

(Caption.)

Defendant moves for an order extending the time within which an appeal may be taken herein to and including the — day of — 19—

Attorney for defendant.

Address.

(Notice of Motion.)

Note.

The affidavit in support of this motion must show excusable neglect based on a failure of moving party to learn of the entry of the judgment, see amended Rule 73(a), this Supplement.

The Advisory Committee's note to Rule 73(a) read:

"The most important amendment of subdivision (a) is the change in the time within which an appeal may be taken. Under the existing law, U.S.C., Title 28, § 230 [28:230], the general rule is that an appeal to the circuit court of appeals from a final judgment of the district court may be taken within three months after the date of the entry of judgment. Other statutes, such as U.S.C., Title 28, § 227 [28:227], fix thirty days from the date of the entry of the judgment as the time within which an appeal may be taken from orders granting or denying injunctions, and certain orders in proceedings for receivers. In the District of Columbia, by special rule authorized by Act of Congress, the time for taking an appeal in an ordinary case was long fixed at twenty days from the date of the entry of the judgment. This time was eventually enlarged to thirty days. The existing Rules of Civil Procedure made no change in these statutory limits. In 1944, however, the Judicial Conference of Senior Circuit Judges adopted a resolution as follows:

That in all civil cases, except where a shorter period may be provided by law and except those wherein the United States is a party, appeals shall be within thirty days after judgment or order denying motions affecting the judgment; and that in cases wherein the United States is a party, the time shall be sixty days; and that this recommendation be addressed to the Committee on Rules of Civil Procedure appointed by the Supreme Court.

"Following this action by the Judicial Conference, the Advisory Committee considered the subject and, as a result, proposes a revision of Rule 73(a).

"Subdivision (a) as amended will fix the time for appeal in all cases, including those from the District of Columbia, at thirty days from the date of the entry of the judgment, unless a shorter period is provided by Act of Congress, but in

an officer or agency thereof, is a party, sixty days is allowed from the date of entry of the judgment. The three-months period now allowed by the statute in most cases is too long. See also Commissioner of Internal Revenue v. Bedford's Estate, 1945, 325 U.S. 283, 65 S. Ct. 1157. The shortened appeal time is in line with developments in state appellate practice; indeed, some states prescribe even shorter periods. See Pound, Appellate Procedure in Civil Cases, 1941, 340-342. All that is necessary to take an appeal under the rules is the filing of a notice of appeal. Ample time is allowed thereafter for perfecting the appeal.

"In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation. The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties. The term 'officer' is defined in amended Rule 81(f).

"The existing law has provided that the time runs from the date of entry of the judgment and not from the date of notice, and this rule is preserved in the proposed amendments, except that some regard is given to the failure to receive notice of the entry of judgment

days may be allowed if a party fails to appeal within the original thirty or sixty days as the case may be, because of excusable neglect based on his failure to learn of the entry of the judgment. In Rule 77 is a provision requiring the clerk to mail notice to all parties of the entry of an order or judgment. That rule is a reiteration of an old equity rule, and the service rendered by the clerk under that rule and the old equity rule was a mere accommodation service and not intended to affect the running of the time for appeal. Yet, in *Hill v. Hawes*, 1944, 320 U.S. 520, 64 S.Ct. 334, originating in the District of Columbia, when only twenty days from the entry of judgment was the period allowed for taking an appeal and the clerk failed to send this formal notice, the district judge relieved the party by vacating the judgment and reentering it, so that the time started anew from the reentry. This action was sustained by the Supreme Court. At a time when the court lost jurisdiction of the cause at the expiration of a term, the holding in *Hill v. Hawes* would have caused no difficulty, but since Rule 6 of these rules abolishes the old doctrine that the expiration of a term ends the court's jurisdiction, the effect of the decision in *Hill v. Hawes* seemed to be that at any time, even long after the entry of judgment, the court might vacate it for the purpose of reentering it and thus reviving the right of appeal. The proposed amendment of Rule 73(a) allows the sort of relief that was brought about in *Hill v. Hawes*, but avoids the difficulty of indefinite lack of finality of the judgment, by providing that the extension of the time for appeal, as the result of excusable neglect for failing to receive notice of it must be limited to an additional thirty days. The party in whose favor the judgment is rendered may, as provided in Rule 77, himself serve a formal notice on the defeated party of the entry of the judgment and thus avoid the possibility of any extension of time for appeal under the amendment of Rule 73(a).

"As recommended by the Judicial Conference of Senior Circuit Judges, proposed Rule 73(a) contains a provision that where a shorter period than that prescribed in the rule is provided for by statute, the statutory period shall prevail. Research has disclosed but one such provision. Section 159 of U.S.C., Title 45 [45:159], pertaining to a judgment of a district court upon an award of a board of arbitration under the Railway Labor Act, provides for an appeal time of 10 days from the decision of the district court. By virtue of Rule 81(a) (3), the rules apply to U.S.C., Title 45,

§ 159 [45:159], with respect to appeals.

"The second sentence of the first paragraph of amended Rule 73(a) makes clear the effect upon appeal time of the granting or denying of a motion under Rules 50(b), 52(b), and 59(e) or the denying of a motion under Rule 59(b). See *Leishman v. Associates Wholesale Electric Co.*, 1943, 318 U.S. 203, 63 S.Ct. 543; *United States v. Crescent Amusement Co.*, 1944, 65 S.Ct. 254; *Neely v. Merchants Trust Co.*, C.C.A.3d, 1940, 110 F.2d 525; *Reliance Life Ins. Co. v. Burgess*, C.C.A.8th, 1940, 112 F.2d 234; *Hawley v. Hawley*, App.D.C.1940, 114 F.2d 745; *Gulf Refining Co. v. Mark C. Walker & Sons Co.*, C.C.A.6th, 1942, 124 F.2d 420, cert. den., 1942, 316 U.S. 682, 62 S.Ct. 1268; *Steber v. Kohn*, C.C.A.7th, 1945, 149 F.2d 4; *Moore and Rogers*, Federal Relief from Civil Judgments, 1946, 55 Yale L.J. 623, 688-690.

"In bankruptcy proceedings it is established that as the bankruptcy court has no terms it has the power at any time for good reason to revise its judgments or orders upon seasonable application and before rights have vested on the faith of its action. A motion so to do may be entertained even after the expiration of time for appeal, and such appeal time will start running anew upon the disposition of the motion. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 1937, 300 U.S. 131, 57 S.Ct. 382; *Bowman v. Loperena*, 1940, 311 U.S. 262, 61 S.Ct. 201; *Pfister v. Northern Illinois Finance Corp.*, 1942, 317 U.S. 144, 63 S.Ct. 133; *Chapman v. Federal Land Bank*, C.C.A.6th, 1941, 117 F.2d 321; *State of Missouri v. Todd*, C.C.A.8th, 1941, 122 F.2d 804. In ordinary civil actions governed by the Federal Rules of Civil Procedure, however, the better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction to entertain a motion, as for new trial or for a rehearing to vacate or amend, as the case may be, and can not thereafter entertain such a motion and thereby start the appeal time running anew. *Safeway Stores, Inc. v. Coe*, App.D.C.1943, 136 F.2d 771; *Jusino v. Morales & Tio*, C.C.A.1st, 1944, 139 F.2d 946; *Nealon v. Hill*, C.C.A.9th, 1945, 149 F.2d 883; *Norris v. Camp*, C.C.A.10th, 1944, 144 F.2d 1. It has been said that the bankruptcy rule, stated supra, is to be distinguished as based on the distinctive nature of bankruptcy proceedings; and that since the Federal Rules have abolished terms and substituted therefor various definite time limits, the same rule should be applied when such time limits expire as was applied formerly when terms were effective. *Safeway Stores, Inc. v. Coe*, supra. See also discussion of these

distinctions in *Oglebay, Some Developments in Bankruptcy Law*, 1946, 20 J. of Nat'l Ass'n of Ref. 76, 80.

"Prior to the adoption of the Federal Rules the term of court played an all-important role in the district court's power over its final judgments at law and in equity. While during the term the district court had plenary power over such judgments, it was in general without power to reconsider its final judgments at law and in equity after the expiration of the term, unless (1) the proceedings seeking relief was begun within the term, or (2) the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period. See *Delaware, L. & W. R. Co. v. Rellstab*, 1928, 276 U.S. 1, (law), 48 S.Ct. 203; *In re Metropolitan Trust Co.*, 1910, 218 U.S. 312, 321 (equity), 31 S.Ct. 18; *United States v. Mayer*, 1914, 235 U.S. 55 (law-criminal), 35 S.Ct. 16; *Zimmerman v. United States*, 1936, 298 U.S. 167 (equity), 56 S.Ct. 706. The exception to the general rule just stated was the utilization, under certain circumstances, of the ancillary remedies of *audita querela*, *coram nobis*, *coram vobis*, bill of review and bill in the nature of review—remedies which grew up to give relief after term time in certain limited and defined situations. Under the proposed amendment to Rule 6(b) the court may not enlarge the time for taking action under Rule 50(b), 52 (b), 59(b), (d) and (e), and 60(b); and the time periods of these rules limit the court's power just as effectively as the term time, which they replace, form-

erly did. See *Moore and Rogers, Federal Relief from Civil Judgments*, 1946, 55 Yale L.J. 623, 627-630, 685-693.

"Rulings or dicta to the contrary, as in *United States v. Schlottfeldt*, C.C.A. 7th, 1943, 136 F.2d 935; *Babler v. United States*, C.C.A.8th, 1943, 137 F.2d 98, dictum; *Suggs v. Mutual Benefit Health & Accident Ass'n*, C.C.A.10th, 1940, 115 F.2d 80, dictum, are not acceptable in light of these considerations.

"The sentence added at the end of the second paragraph of the amended subdivision gives the district court express power to dismiss an appeal on stipulation or upon motion by the appellant after the notice of appeal has been filed but before the appeal is docketed. Such action avoids the useless formality and expense of docketing the appeal and then dismissing it in the appellate court, as where the parties have agreed to a settlement and wish to protect their rights. Heretofore, the general view has been that once the notice of appeal was filed the district court had no authority to proceed further in the matter, except in aid of the appeal or under Rule 60(a), until it has received the mandate of the appellate court. *Miller v. United States*, C.C.A.7th, 1940, 114 F.2d 267; *Fiske v. Wallace*, C.C.A.8th, 1940, 115 F.2d 1003. cert. den., 1941, 314 U.S. 663, 62 S.Ct. 123; *Schram v. Safety Investment Co.*, E.D.Mich. 19A42, 45 F.Supp. 636; *In re Chin Ben Shim*, D.Mass. 1941, 2 F.R.D. 50, 4 Fed. Rules Serv. 72a.42, Case 1. But cf. *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, S.D.N.Y.1942, 3 F.R.D. 162, 6 Fed. Rules Serv. 73a42, Case 1.

703A. Motion for Leave to Appeal in Forma Pauperis.

(Caption.)

Plaintiff moves for leave to proceed on appeal herein in forma pauperis upon a typewritten record.

Attorney for plaintiff.

Address.

(Notice of Motion.)

Cross-Reference.

Appeals in forma pauperis, Rule 75 (m), this Supplement.

Note of Advisory Committee to Rule 75(m):

"This subdivision permits a relaxation of the normal requirements for a record under Rule 75, in order that a pauper

appellant may not be deprived of his right to appeal. Without such a provision some difficulty has been encountered in pauper appeals, as evidenced by *Hall v. Gordon*, App.D.C.1941, 74 App. D.C. 24, 119 F.2d 463, and *Middleton v. Hartford Accident & Indemnity Co.*, C.C.A.5th, 1941, 119 F.2d 721."

706A. Motion to Enforce Liability of a Surety.

(Caption.)

Defendant moves for an order enforcing the liability of AB, the surety, upon the undertaking filed herein on the — day of —, 19—, to secure payment of such costs and damages as may be adjudged to have been suffered as a result of the wrongful restraint of the defendant from (nature of restraint).

Attorney for defendant.

Address.

Note.

Amended Rule 65(c) provides that the liability of a surety may be enforced on motion without the necessity of an independent action.

The Advisory Committee's note to Rule 65(c) read:

"It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell v. Farley*, 1881, 105 U.S. 433, 466. It is believed, however, that in all cases the litigant should have a right

to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f) for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50, sub. n of the Bankruptcy Act, 11 U.S.C., § 78, sub. n [11:78], under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 *Collier on Bankruptcy*, 14th ed. by Moore and Oglebay, 1853-1854."

707. Motion to Extend Time to File Transcript of Record.**Note.**

The motion should be made in the Circuit Court of Appeals if the extension desired is more than ninety days from

the date of filing of notice of appeal. *Mutual Benefit Health & Accident Assn. v. Snyder* (C. C. A. 6), 109 Fed. (2d) 469.

NOTES TO DECISIONS**Designation of Contents of Record on Appeal.**

Failure of appellant to serve on appellee and file with the court a designation of the portions of the record to be contained in the record on appeal is ground for dismissal of the appeal. *McBee v. United States* (C. C. A. 10), 126 Fed. (2d) 238.

Docketing and Record on Appeal.

Appellant may not docket his appeal after the time allowed under Rule 73 has expired, except by special leave of the court. A district court has no authority to grant an extension of time to docket an appeal after the time allowed under the rule has expired and the record has been transmitted to the appellate court. The time limitation on filing record on appeal is not jurisdictional, but satisfactory reasons must be ad-

vanced to obtain special relief from such limitation. *Gammill v. Federal Land Bank* (C. C. A. 7), 129 Fed. (2d) 501.

The district court, within the forty-day period allowed for docketing an appeal, may grant an extension on an ex parte written motion. In *re Pramer* (C. C. A. 7), 131 Fed. (2d) 733.

In an action filed by a bondholder for himself and as attorney in fact for other owners, a motion to intervene by one of the coowners filed after bondholder had entered notice of appeal and then withdrawn by turning in his bonds, will be granted as a motion to amend, so as to enable coowner to complete the appeal. The settling of differences between a party representing a class and their opponents should not cause the others to lose any rights they may have had in the litigation. A district court does not lose jurisdiction of a case to the appellate

court until the record has been docketed on appeal. *American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.* (D. C.-N. Y.), 161 Bull. 76.

How Taken.

The time limitation on filing record on appeal is not jurisdictional, but satisfactory reasons must be advanced to obtain special relief from such limitation. *Gammill v. Federal Land Bank* (C. C. A. 7), 129 Fed. (2d) 501.

Although the method of taking an appeal has been changed by the Rules of

Civil Procedure the time limitation remains unaffected. Effectiveness of a decree depends upon notation in the docket, and the time limitation for appeal runs from such entry and not from the signing of the formal order. *Mosier v. Federal Reserve Bank* (C. C. A. 2), 132 Fed. (2d) 710.

No assignment of errors is required in taking an appeal under the Rules of Civil Procedure. *Starfred Properties, Inc. v. Ettinger* (C. C. A. 2), 163 Bull. 102.

707A. Order Extending Time Within Which to File Transcript of Record on Appeal.

(Caption.)

Upon consideration of the motion of counsel for appellant,

It is ordered that the time within which to file the transcript of record on appeal in the above entitled cause be, and the same is hereby, extended to and including ———, 19—.

Judge, United States district court.

Date_____.

710A. Notice of Proposed Statement of Evidence.

(Caption.)

Please take notice that on the — day of —, 19—, at 10:30 A.M., appellant will submit to this Court at —, for settlement and approval, the attached statement of the evidence adduced at the trial of this case for inclusion in the record on appeal.

Date_____.

Attorney for appellant.

Address.

Cross-Reference.

Appeals when no stenographic report was made, Rule 75(n), this Supplement, p. 239.

Note of Advisory Committee to Rule 75(n):

"Subdivision (n) provides a method whereby a record may be prepared in the perhaps rare case where there is no reporter present at all and no stenographic report is made of the proceedings. Normally, these situations are now unlikely in view of Public Law 222,

78th Cong., c. 3, § 1, 2d Sess., approved Jan. 20, 1944, 28 U.S.C. § 9a [28:9a], providing for the appointment of official court reporters, prescribing their duties and providing for the payment by the United States of fees for transcripts for appeals in forma pauperis. It is believed, however, that the provisions of subdivision (n) may nevertheless be helpful as supplemental safeguards to prevent injustice in unusual cases. There is nothing in the subdivision inconsistent with the new statute.

717. Motion for Stay after Trial.

(Caption.)

The defendant moves that the execution and enforcement of the judgment entered herein on ———, 19—, be stayed until the final disposition of the appeal taken by the defendant therefrom (until the disposition of the motion made by him for a new trial) (until the disposition of the motion made by him for judgment in accordance with his motion for a directed verdict) (until the disposition of the motion made by him for amendment to the findings and for additional findings).

The grounds for this motion are as follows:

This action was brought for (specific performance of a contract to convey certain real property).

The defense is that (the alleged contract is invalid under the statute of frauds).

This defense is advanced in good faith and not for the purposes of delay, and the defendant is advised by counsel that the defense is meritorious.

On ———, 19—, after a trial, judgment was rendered in favor of plaintiff directing (specific performance of said contract). On ———, 19—, an appeal from said judgment was taken by the defendant to the Court of Appeals for the ——— Circuit, and is now pending.

(A motion for a new trial was made by the defendant and is now pending.)

(A motion was made by the defendant for judgment in accordance with his motion for a directed verdict and is now pending.)

(A motion was made by the defendant for amendment to the findings and for additional findings and is now pending.)

Said appeal (motion) may be rendered nugatory unless a stay is granted pending its disposition, since if defendant is in the meantime required to convey said property to plaintiff, said property may be transferred to a third party or become encumbered and could not be reconveyed to defendant, even if he is ultimately successful in this action.

Date——.

Attorney for defendant.

Address.

Source of Form.

Federal Rules of Civil Procedure, Rule 62(b), see p. 234 of this Supplement.

Cross-Reference.

Stays are governed by Rule 62 of the Rules of Civil Procedure, see p. 930 of parent volume and p. 234 of this Supplement.

718. Order Granting Stay.

(Caption.)

This cause came on to be heard on defendant's motion for a stay pending (the final disposition of the appeal taken by the defendant from the judgment herein) (the disposition of the defendant's motion for a new trial) (the disposition of the defendant's motion for judgment in accordance with his motion for a directed verdict) (the disposition of defendant's motion for amendment to the findings and for additional findings), and the court being duly advised, it is

Ordered, that all proceedings for the execution or enforcement of the judgment entered in the above-entitled action on — —, 19—, are hereby stayed until (the final determination of the appeal taken by the defendant from said judgment) (the determination of the defendant's motion for a new trial) (the determination of the defendant's motion for judgment in accordance with his motion for a directed verdict) (the determination of defendant's motion for amendment to the findings and for additional findings); and it is further

Ordered, that the aforesaid stay is granted on condition that within — days, the defendant file a bond in the sum of — dollars (\$—), with sufficient sureties to be approved by the court, that in the event the said appeal (motion) is determined against him, or is dismissed, he will abide by and promptly carry out and fulfill the directions of the aforesaid judgment; and on the further condition that the defendant promptly prosecute the said appeal (motion).

Date—.

 United States district judge.
Cross-Reference.

See Rule 62(b) of the Rules of Civil Procedure, p. 234 of this Supplement.

Introduction.

Review by the Supreme Court of the United States of judgments of the highest court of a state may be had either on appeal or by certiorari. Appeal may be taken from any decision in an action in which is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity. Review by certiorari may be had of any final judg-

ment or decree of the highest court of a state in any action in which is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States. The power of the Supreme Court to review these last mentioned decisions may be exercised without regard to whether the federal claim is sustained or denied. (28 U.S.C. 1257.)

SECTION 3—APPEAL FROM STATE COURT TO SUPREME COURT.

720. Petition for Allowance of Appeal from State Court to the Supreme Court of the United States.

In the Supreme Court of (State)

(Caption.)

Petition for Allowance of Appeal to the
Supreme Court of the United States

AB, the appellant above named and petitioner herein, respectfully states that on the — day of —, 19—, this court entered a judgment against it (affirming) (reversing) the order of the (lower court of State); that a motion for reargument was filed on —, 19—, and that said motion was denied on —, 19—.

Petitioner, believing that the judgment of this court is incorrect, prays that it may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this court, and that a transcript of the record in this cause, duly authenticated, shall be sent to the Supreme Court of the United States.

Petitioner submits and presents to the court herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause in compliance with rule — of this court and rule 12 of the Supreme Court of the United States.

Petitioner.

Attorneys for petitioner.**Source of Form.**

Record in Defense Plant Corporation

v. County of Beaver, Pennsylvania, 328
U.S. 204, 90 L. ed. 1172, 66 Sup.Ct. 992.**720A. Assignment of Errors on Appeal from State Court to the Supreme Court of the United States.**

In the Supreme Court of (State)

(Caption.)

Assignment of Errors

The court erred:

1. In holding that the act of (State statute) is constitutional insofar as it purports to authorize the assessment for taxation of machinery owned by (federally owned corporation).

2. In holding that the assessment for taxation, as part of the real estate, of machinery owned by (federally owned corporation) and used in the operation of an industrial plant owned by said corporation is not repugnant to the Constitution and laws of the United States.

3. In holding that the act of Congress (federal statute citation) was to be construed as waiving with respect to machinery owned by (federally

owned corporation) the constitutional immunity otherwise enjoyed by such agency from state and local taxation.

4. In (affirming) (reversing) the order of the (lower State court), which order confirmed the assessment of machinery owned by (federally owned corporation).

Appellant.

Attorneys for appellant.

Source of Form.

Record in Defense Plant Corporation

v. County of Beaver, Pennsylvania, 328
U.S. 204, 90 L. ed. 1172, 66 Sup.Ct. 992.

720B. Order Allowing Appeal From State Court to the Supreme Court of the United States.

In the Supreme Court of (State)

(Caption.)

Order Allowing Appeal

AB, appellant in the above entitled action, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled action by the supreme court of (State) on the — day of —, 19—, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such cases made and provided:

It is now here ordered that an appeal be and the same is allowed to the Supreme Court of the United States from the supreme court of the (State) in the above entitled cause, and that the clerk of the supreme court of the (State) shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date.

[It appearing that appellant is a corporate agency of the United States, its stock being wholly owned, directly or indirectly, by the United States, no bond or other security for the prosecution of such appeal or to answer in damages or costs shall be required of appellant.]

Chief Justice of the
supreme court of (State).

Date_____.

Source of Form.

Record in Defense Plant Corporation

v. County of Beaver, Pennsylvania, 328
U.S. 204, 90 L. ed. 1172, 66 Sup.Ct. 992.

720C. Stipulation Designating Parts of Record to be Included in Transcript on Appeal from State Court to the Supreme Court of the United States.

In the Supreme Court of (State)

(Caption.)

It is hereby stipulated and agreed between attorneys for (appellant) and attorneys for (appellee) that the record on appeal to the Supreme Court of the United States in this cause shall consist of the entire proceedings before the supreme court of (State), including:

1. The entire record on appeal to the supreme court of (State) from the (lower State court) as printed and used in the supreme court of (State) in this case.
2. The assignment of error made by (appellant) on appeal to the supreme court of (State) from the (lower State court).
3. The docket entries of the supreme court of (State).
4. The opinion of the supreme court of (State) filed herein on _____, 19—.
5. The motion for reargument before the supreme court of (State), filed _____, 19—, and the order of court denying the same dated _____, 19—.
6. The petition for allowance of appeal to the Supreme Court of the United States.
7. The jurisdictional statement filed by (appellant), including the copy of the opinion and judgment of the supreme court of (State) thereto appended.
8. Assignments of error on appeal to the Supreme Court of the United States.
9. The order of the supreme court of (State) allowing an appeal to the Supreme Court of the United States.
10. Appellee's statement opposing jurisdiction and motion to dismiss.
11. This stipulation.

Attorneys for appellant.

Attorneys for appellee.

Source of Form.

Record in Defense Plant Corporation

v. County of Beaver, Pennsylvania, 328
U.S. 204, 90 L. ed. 1172, 66 Sup.Ct. 992.

720D. Statement of Points to be Relied upon and Designation of Record on Appeal from State Court to the Supreme Court of the United States.

In the Supreme Court of the United States

(Caption.)

Pursuant to rule 13, paragraph 9, of this court, the appellant states that it intends to rely upon all of the points in its assignment of errors. The appellant deems the entire record on appeal as necessary for consideration of the points so to be relied upon.

Appellant.

By _____
Attorney for appellant.

Service of the above statement of points and designation of record to be relied on accepted this — day of —, 19—.

Attorney for appellee.

Source of Form. v. County of Beaver, Pennsylvania, 328
Record in Defense Plant Corporation U.S. 204, 90 L. ed. 1172, 66 Sup.Ct. 992.

720E. Order Noting Probable Jurisdiction.

In the Supreme Court of the United States

(Caption.)

The statement of jurisdiction in this case having been submitted and considered by the court, probable jurisdiction is noted.

Source of Form. v. County of Beaver, Pennsylvania, 328
Record in Defense Plant Corporation U.S. 204, 90 L. ed. 1172, 66 Sup.Ct. 992.

721. Order Staying Mandate of State Supreme Court Pending Review by Certiorari in Supreme Court.

In the Supreme Court of (State)

(Caption.)

Order Recalling and Staying Mandate

Filed ———, 19—

Upon motion of (appellee) (appellant), it is ordered that the mandate in the above entitled cause be recalled and stayed until ———, 19—.

Justice of the supreme court of (State).

Source of Form. of Labor v. United States, 328 U.S. 8,
Record in People of the State of Illinois, ex rel. Robert L. Gordon, Director 90 L. ed. 1049, 66 Sup.Ct. 841.

721A. Praeceptum for Record for Use on Application to the Supreme Court of the United States for Writ of Certiorari.

In the Supreme Court of (State)

(Caption.)

The (appellee) (appellant) in the above entitled cause hereby requests and directs you to prepare and duly certify a transcript of record in the above entitled cause and to include therein copies of the following items:

1. Appellant's abstract of record.
2. Opinion of this court filed ———, 19—.
3. Judgment of this court.
4. Notice of intention to file petition for rehearing.
5. Petition for rehearing.
6. Order denying petition for rehearing.
7. Order staying mandate.
8. This praecipe for record, with proof of service.
9. Clerk's certificate.

Attorney for (appellee) (appellant).**Proof of Service**

Received a copy of the above and foregoing praecipe for record and proof of service this ——— day of ———, 19—.

Attorney for (appellee) (appellant).**Source of Form.**

Record in People of the State of Illinois, ex rel. Robert L. Gordon, Director

of Labor v. United States, 328 U.S. 8, 90 L. ed. 1049, 66 Sup.Ct. 841.

721B. Order Extending Time Within Which to File Petition for Certiorari.

In the Supreme Court of the United States

(Caption.)

Upon consideration of the application of counsel for the petitioner.

It is ordered that the time for filing a petition for certiorari in the above entitled cause be, and the same is hereby, extended to and including ———, 19—.

Associate Justice of the
Supreme Court of the United States.

Date _____.

Source of Form.

Record in People of the State of Illinois, ex rel. Robert L. Gordon, Director

of Labor v. United States, 328 U.S. 8, 90 L. ed. 1049, 66 Sup.Ct. 841.

721C. Petition for Writ of Certiorari to the Supreme Court of a State.

In the Supreme Court of the United States

(Caption.)

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by (name of petitioner) for this court's writ of certiorari to review a judgment and opinion of the supreme court of (State) rendered in this cause on ———, 19—.

JURISDICTION

The jurisdiction of this court to review the questions herein presented is invoked under section 237(b) of the Judicial Code of the United States, as amended (28 U.S.C. 344). The judgment of the supreme court of (State) which was entered on ———, 19—, became final on ———, 19—, upon the denial of the petition for rehearing. The time for filing this petition and brief in support thereof was extended by this court to ———, 19—.

The court below held that under section — of the United States Revised Statutes the claim of the United States was entitled to priority over the claim of the petitioner for unemployment compensation contributions (R. —). The applicability of section — of the United States Revised Statutes was raised in every stage of the proceedings below. The court below passed upon the question and specifically allowed priority to the claim of the United States.

QUESTIONS PRESENTED

1. _____.
2. _____.

STATUTES

The statutes involved are set forth in the Appendix, infra, pp. —, —.

SPECIFICATION OF ERRORS TO BE URGED

The supreme court of (State) erred:

1. In holding that the claim of the United States was entitled to priority under section — of the United States Revised Statutes over the claim of the petitioner for unemployment compensation contributions.
2. In failing to hold that petitioner's claim was entitled to priority over the claim of the United States.

CONCLUSION

Wherefore petitioner prays that this petition for a writ of certiorari be granted, and that this court's writ of certiorari issue to the supreme court of (State) for the purpose of reviewing the questions hereinbefore specified.

Counsel for petitioner.

Source of Form.

Record in People of the State of Illinois, ex rel. Robert L. Gordon, Director

of Labor v. United States, 328 U.S. 8, 90 L. ed. 1049, 66 Sup.Ct. 841.

721D. Order Allowing Certiorari.

In the Supreme Court of the United States

(Caption.)

Order Allowing Certiorari

Filed ———, 19—

The petition herein for a writ of certiorari to the supreme court of (State) is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied petition shall be treated as though filed in response to such writ.

Source of Form.

Record in People of the State of Illinois, ex rel. Robert L. Gordon, Director

of Labor v. United States, 328 U.S. 8, 90 L. ed. 1049, 66 Sup.Ct. 841.

PART TWO—CRIMINAL ACTIONS

CHAPTER 22—CRIMINAL PROCEDURE

| Form | | Form | |
|-------|---|-------|--|
| 725A. | Commissioner's summons. | 744. | Motion by one defendant to transfer proceedings to another district or division. |
| 725B. | Commissioner's warrant of arrest. | 745. | Motion for bill of particulars. |
| 725C. | Commissioner's temporary commitment. | 745A. | Order for bill of particulars. |
| 725D. | Commissioner's final commitment. | 746. | Motion to strike surplusage from indictment. |
| 726. | Waiver of indictment. | 747. | Motion for suspension of proceedings on ground of insanity. |
| 727. | Indictment for murder in the first degree of federal officer. | 748. | Waiver of trial in district in which indictment is pending. |
| 728. | Indictment for murder in the first degree on federal reservation. | 749. | Motion for change of venue on ground of prejudice. |
| 729. | Indictment for mail fraud. | 749A. | Order granting motion for change of venue. |
| 730. | Indictment for sabotage. | 750. | Consent by defendant to proceedings in his absence. |
| 731. | Indictment for Internal Revenue violation. | 750A. | Consent to trial before United States Commissioner. |
| 732. | Indictment for interstate transportation of stolen motor vehicle. | 751. | Affidavit for search warrant. |
| 732A. | Indictment for receiving stolen motor vehicle. | 751A. | Search warrant. |
| 733. | Indictment for impersonation of federal officer. | 751B. | Motion for the return of seized property and the suppression of evidence. |
| 734. | Indictment for obtaining money by impersonation of federal officer. | 751C. | Order suppressing evidence and directing return of seized property. |
| 735. | Indictment for presenting fraudulent claim against the United States. | 752. | Motion by defendant to take deposition. |
| 736. | Warrant for arrest of defendant. | 752A. | Notice of motion. |
| 737. | Appearance bond. | 752B. | Order granting leave to take deposition. |
| 738. | Information for food and drug violation. | 752C. | Notice to take deposition. |
| 739. | Summons. | 752D. | Motion to shorten or extend time for taking of deposition. |
| 740. | Motion by defendant to dismiss the indictment. | 752E. | Order changing time of taking deposition. |
| 740A. | Motion to dismiss indictment on objection to the array of grand jury or to individual jurors. | 752F. | Order directing payment of expense of taking deposition. |
| 740B. | Order dismissing indictment. | 752G. | Motion by witness to have his deposition taken. |
| 741A. | Warrant of removal on indictment. | 753. | Motion by defendant for discovery and inspection. |
| 741B. | Warrant of removal on complaint or information. | 754. | Order to permit inspection of documents, etc. |
| 742. | Bench warrant—Violation of probation. | 755. | Motion to withdraw plea of guilty. |
| 743. | Application for transfer from one division to another within the district. | 756. | Waiver of trial by jury. |
| 743A. | Order transferring case from one division to another within the district. | 757. | Stipulation for jury of less than twelve. |
| | | 758. | Motion for separate trial of offenses. |
| | | 759. | Motion for severance of defendants. |

| Form | | Form | |
|-------|--|-------|---|
| 760. | Preacipe for subpoena other than on behalf of United States. | 773. | Motion to reduce sentence. |
| 760A. | Praecipe for subpoena on behalf of United States. | 774. | Application of prisoner for discharge. |
| 760B. | Subpoena to testify. | 774A. | Oath of prisoner for discharge from imprisonment. |
| 760C. | Commissioner's subpoena. | 774C. | Preliminary order for poor convict. |
| 761. | Warrant for arrest of witness. | 774D. | Discharge from imprisonment. |
| 762. | Subpoena to produce document on object. | 775. | Motion to set aside forfeiture of bail. |
| 762A. | Motion to vacate subpoena for production of documents. | 775A. | Motion to remit forfeiture. |
| 763. | Motion by indigent defendant for issuance of subpoena. | 776. | Stay of execution. |
| 763A. | Affidavit in support of motion by indigent defendant for issuance of subpoena. | 777. | Notice of appeal to Circuit Court of Appeals. |
| 763B. | Order directing issuance of subpoena for indigent defendant. | 778. | Statement of docket entries. |
| 764. | Motion for judgment of acquittal. | 779. | Petition by government for certiorari in Supreme Court. |
| 764A. | Judgment of acquittal. | 780. | Petition by defendant for certiorari in Supreme Court. |
| 769A. | Judgment and commitment in petty offense cases. | 781. | Application to Supreme Court justice for bail pending certiorari. |
| 772. | Motion to correct illegal sentence. | 782. | Order of Supreme Court justice granting bail. |
| 772A | Notice of appeal from United States Commissioner to District Court. | | |

Important Notice

The new Rules of Criminal Procedure for the United States District Courts are deemed to have superseded and rendered obsolete all the Criminal Procedure forms found in the parent volume except four, to wit: Forms 741, 767, 768, and 771. For the convenience of our subscribers these four forms have been reproduced in this pocket part supplement. Consequently you are to disregard all the Criminal Procedure Forms, numbered 725 to 777 inclusive, appearing in the parent volume.

The above numbers have been re-utilized in numbering the new forms set out herein.

It will be understood that the subject matter of a new form carrying an old form number is not necessarily the same.

The new rules are set out in this supplement following chapter 37—Soldiers' and Sailors' Civil Relief Act.

725. Complaint.

United States District Court

.....District of.....

.....Division

Commissioner's Docket No.....

Case No.....

United States of America

v.

} Complaint
for
Violation of
U. S. C. Title.....
Section.....

BEFORE

Name of Commissioner

Address of Commissioner

The undersigned complainant being duly sworn states:

That on or about....., 19....., at

..... in the..... District

of,

(name of accused)

did here insert statement of the essential facts constituting the offense charged

.....

.....

.....

And the complainant further states that he believes that

.....

.....

.....

are material witnesses in relation to this charge.

.....

.....

.....

Signature of Complainant.

.....

Official Title, "if any."

Sworn to before me, and subscribed in my presence,, 19.....

.....

United States Commissioner.

Cross-Reference.

Complaint, Rule 3.

725A. Commissioner's Summons.

United States District Court

..... District of.....

..... Division

Commissioner's Docket No.....

Case No.....

United States of America

v.

Summons

To.....

Name of Defendant

You are hereby summoned to appear before the undersigned United States

Commissioner, at

place

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on....., 19....., at.....o'clock....M. to answer to a complaint
time
charging you with.....
here describe offense charged in complaint

in violation of U.S.C. Title.....Section.....

Date....., 19.....

United States Commissioner.

This summons was received by me at.....on
19.....

Defendant.

RETURN*

This summons was served by me on....., 19..... in the following manner:

Name.

Title.

*As to who may serve the summons and the manner of its service see Rule 4 (c) of the Federal Rules of Criminal Procedure and Rule 4 (c) of the Rules of Civil Procedure.

Cross-Reference.

Warrant or summons upon complaint,
Rule 4.

725B. Commissioner's Warrant of Arrest.

United States District Court

District of _____

Division

Commissioner's Docket No.

Case No.

United States of America

Y.

Warrant of Arrest

1.

To

You are hereby commanded to arrest.....
here insert name of defendant or description
and bring him forthwith before the nearest available United States Commissioner to answer to a complaint charging him with.....

here describe offense charged in complaint

in violation of U.S.C. Title,, Section

Date, 19.....

United States Commissioner.

1. Here insert designation of officer to whom warrant is issued.

2.

RETURN

Received, 19..... at, and executed by arrest
of at on, 19.....

Name.

Title.

Date, 19.....

..... District of
By, Deputy

Cross-Reference.

Warrant or summons upon complaint,
Rule 4.

725C. Commissioner's Temporary Commitment.

United States District Court

..... District of

..... Division

Commissioner's Docket No.

Case No.

United States of America

v.

} Temporary Commitment
of

To the United States Marshal of the District of

You are hereby commanded to take the custody of the above named
defendant and to commit him with a certified copy of this commitment to
the custodian of a place of confinement within this district approved by
the Attorney General of United States where the defendant shall be received
and safely kept until discharged in due course of law. The above named
defendant has been arrested but not yet fully examined by me upon the
complaint of, charging that on or about,
19..... at in the District of
..... the defendant did

in violation of U.S.C. Title.....Section.....; and he has been directed to furnish bail in the sum of.....dollars (\$.....) for his appearance before me at.....in accordance with all my orders and directions relating thereto, and he has failed to do so.

Dated:

United States Commissioner.

RETURN

Received this commitment and designated prisoner on....., 19....., and on, 19....., committed him to, and left with the custodian at the same time a certified copy of this commitment.

Dated:

United States Marshal.

....., 19.....

District of

By

Deputy.

725D. Commissioner's Final Commitment.

United States District Court

.....District of.....

.....Division

Commissioner's Docket No.....

Case No.....

United States of America

v.

Final Commitment

of

To: The United States Marshal of the.....District of.....;

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within this district approved by the Attorney General of United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant was arrested upon the complaint of charging that on or about....., 19....., in the District of, the defendant did.....

in violation of U.S.C. Title....., Section..... and he, after examination by me on....., 19....., where it appeared that there is probable

cause to believe that the offense so charged has been committed and that he has committed it, has been directed to furnish bond in the sum of..... dollars (\$.....) for his appearance in the District Court of the United States for the..... District of..... at in accordance with all orders and directions of the court relative to his appearance before the court, and he has failed to do so.

Dated:

.....
United States Commissioner.

....., 19.....

RETURN

Received this commitment and designated prisoner on, 19....., and on, 19....., committed him....., and left with the custodian at the same time a certified copy of this commitment.

Dated:

.....
United States Marshal.

....., 19.....

..... District of

By Deputy

Cross-Reference.

Probable cause, commitment, Rule 5 (c).

726. Waiver of Indictment.

In the United States District Court for the District of,
..... Division

United States of America

v.

John Doe

} No.
(18 U. S. C. §§ 2312, 2313)

John Doe, the above named defendant, who is accused of violating the National Motor Vehicle Theft Act, being advised of the nature of the charge and of his rights, hereby waives in open court prosecution by indictment and consents that the proceeding may be by information instead of by indictment.

.....
Defendant.

.....
Witness.

.....
Counsel for defendant.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 18.

Note.

It has been suggested by United States Attorney Doyle of the southern district of Illinois that there be added to this form a statement that defendant

was previously advised of his right to counsel (if he was not represented by counsel) and waived that right as well as the right to have an indictment returned against him. The department of justice termed the suggestion a good one, since in habeas corpus cases it was

frequently difficult to prove that the accused had been informed of his right to counsel.

Cross-Reference.

Indictment, waiver, Rule 7(b).

NOTES TO DECISIONS

Incompetency

When the court finds that when the waiver of indictment was executed defendant did not have sufficient mental capacity to comprehend the nature and

consequences of her act, it was proper to adjudge that the waiver was void and that the cause should not proceed further. U. S. v. Chisholm. (DC-Ark), 5 FedRDec397.

727. Indictment for Murder in the First Degree of Federal Officer.

In the United States District Court

For the _____ District of _____,

_____ Division

United States of America

v.

John Doe

No. _____
(18 U. S. C. §§ 1111, 1114)

The grand jury charges:

On or about the _____ day of _____, 19____, in the _____ District of _____, John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure, Appendix of Forms, Form 1.

Cross-Reference.

Indictment, use, nature and contents, Rule 7(a), (c).

NOTES TO DECISIONS

Signature.

The fact that an indictment was signed by an assistant district attorney using the name of the district attorney did not render the indictment defective. Wheatley v. U. S., (CCA4), 159F(2d) 599.

Sufficiency.

It is no longer necessary in the federal courts to follow the old common-law rules of criminal pleadings, and an indictment or information in the language of the statute is sufficient except

where the words of the statute do not contain all the essential elements of the offense. Sutton v. U. S., (CCA5), 157 F(2d) 661.

There are two tests that an indictment must meet: first, it must apprise defendant of the specific offense with which he is charged; second, the indictment must be sufficiently definite in order that, if defendant is later charged with the same offense, he will be in a position to interpose a plea of double jeopardy. U. S. v. Starks, (DC-NY), 6FedRDec43; U. S. v. Fields, (DC-DC), 6FedRDec203.

728. Indictment for Murder in the First Degree on Federal Reservation.

In the United States District Court for the
District of _____, _____ Division

United States of America

v.

John Doe

No. _____
(18 U. S. C. § 1111)

The grand jury charges:

On or about the _____ day of _____, 19—, in the
_____ District of _____, and on lands acquired
for the use of the United States and under the (exclusive) (concurrent)
jurisdiction of the United States, John Doe with premeditation shot and
murdered John Roe.

A True Bill.

Foreman.

United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 2.

729. Indictment for Mail Fraud.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe et al.

No. _____
(18 U. S. C. § 1341)

The grand jury charges:

1. Prior to the _____ day of _____, 19—, and continuing to the _____ day of _____, 19—¹, the defendants John Doe, Richard Roe, John Stiles and Richard Miles devised and intended to devise a scheme and artifice to defraud purchasers of stock of XY Company, a California corporation, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the XY Company owned a mine at or near San Bernardino, California; that the mine was in actual operation; that gold ore was being obtained at the mine and sold at a profit; that the current earnings of the company would be sufficient to pay dividends on its stock at the rate of six per cent per annum.

2. On the _____ day of _____, 19—, in the _____ District of _____, the defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Mary Brown, 110 Main Street, Stockton, California, to be sent or delivered by the Post Office Establishment of the United States.

SECOND COUNT

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the _____ day of _____, 19—, in the _____ District of _____, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. John J. Jones, 220 First Street, Batavia, New York, to be sent or delivered by the Post Office Establishment of the United States.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

¹ Insert last mailing date alleged.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 3.

730. Indictment for Sabotage.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____
(18 U. S. C. § 2154)

The grand jury charges:

On or about the _____ day of _____, 19—, within the _____ District of _____, while the United States was at war, John Doe, with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for or carrying on the war, wilfully made and caused to be made in a defective manner certain war material consisting of shells, in that he placed and caused to be placed certain material in a cavity of the shells so as to make them appear to be solid metal, whereas in fact the shells were hollow.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 4.

731. Indictment for Internal Revenue Violation.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____
(26 U. S. C. § 2833)

The grand jury charges:

On or about the _____ day of _____, 19—, in the
_____ District of _____, John Doe carried on the
business of a distiller without having given bond as required by law.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 5.

732. Indictment for Interstate Transportation of Stolen Motor Vehicle.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____
(18 U. S. C. § 2312)

The grand jury charges:

On or about the _____ day of _____, 19—, John
Doe transported a stolen motor vehicle from _____, State of
_____, to _____, State of _____,
in _____ District of _____, and he then knew the
motor vehicle to have been stolen.

A True Bill.

Foreman.

United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 6.

732A. Indictment for Receiving Stolen Motor Vehicle.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____
(18 U. S. C. § 2313)

The grand jury charges:

On or about the _____ day of _____, 19—, in the
_____ District of _____, John Doe received and
concealed a stolen motor vehicle, which was moving as interstate commerce,
and he then knew the motor vehicle to have been stolen.

A True Bill.

Foreman.

United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 7.

733. Indictment for Impersonation of Federal Officer.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____
(18 U. S. C. § 912)

The grand jury charges:

On or about the _____ day of _____, 19—, in the
_____ District of _____, John Doe with intent to
defraud the United States and Mary Major falsely pretended to be an
officer and employee under the authority of the United States, namely, an
agent of the Federal Bureau of Investigation, and falsely took upon himself

to act as such, in that he falsely stated that he was a special agent of the Federal Bureau of Investigation engaged in pursuit of a person charged with an offense against the United States.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 8.

734. Indictment for Obtaining Money by Impersonation of Federal Officer.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____
(18 U. S. C. § 912)

The grand jury charges:

On or about the _____ day of _____, 19____, in the _____ District of _____, John Doe with intent to defraud the United States and Mary Major, falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Alcohol Tax Unit of the Department of the Treasury, and in such pretended character demanded and obtained from Mary Major the sum of \$100.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 9.

735. Indictment for Presenting Fraudulent Claim Against the United States.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

No. _____

(18 U. S. C. § 287)

The grand jury charges:

On or about the _____ day of _____, 19—, in the _____ District of _____, John Doe presented to the War Department of the United States for payment a claim against the Government of the United States for having delivered to the Government 100,000 lineal feet of No. 1 white pine lumber, and he then knew the claim to be fraudulent in that he had not delivered the lumber to the Government.

A True Bill.

_____,
Foreman._____,
United States Attorney.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 10.

736. Warrant for Arrest of Defendant.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

No. _____

To _____:¹

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the _____ District of _____ in the city of _____ to answer to an indictment charging him with robbery of property of the First National Bank of _____, in violation of 18 U. S. C. § 2113.

_____,
Clerk.

By _____,
Deputy Clerk.

¹Insert designation of officer to whom warrant is issued, e. g., "any United States Marshal or any other authorized officer"; or "United States Marshal for _____ District of _____"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 12.

Cross-References.

Warrant or summons upon complaint,
Rule 4.Warrant or summons upon indictment
or information, Rule 9.

737. Appearance Bond.

In the United States District Court
 For the _____ District of _____
 _____ Division _____

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to the United States of America the sum of _____ Dollars (\$_____).

The condition of this bond is that the defendant _____ is to appear in the District Court of the United States¹ for the _____ District of _____ at _____² in accordance with all orders and directions of the Court³ relating to the appearance of the defendant before the Court³ in the case of United States v. _____, File number _____; and if the defendant appears as ordered, then this bond is to be void, but if the defendant fails to perform this condition payment of the amount of the bond shall be due forthwith. If the bond is forfeited and if the forfeiture is not set aside or remitted, judgment may be entered upon motion in the District Court of the United States for the _____ District of _____ against each debtor jointly and severally for the amount above stated together with interest and costs, and execution may be issued or payment secured as provided by the Federal Rules of Criminal Procedure and by other laws of the United States.

This bond is signed on this _____ day of _____, 19— at _____.

_____,
 Name of Defendant.

_____,
 Address.

_____,
 Name of Surety.

_____,
 Address.

_____,
 Name of Surety.

_____,
 Address.

Signed and acknowledged before me this _____ day of _____, 19—.

Approved: _____.

JUSTIFICATION OF SURETIES

I, the undersigned surety, on oath say that I reside at _____; and that my net worth is the sum of _____ Dollars (\$_____).

I further say that _____

_____,
Surety.Sworn to and subscribed before me this _____ day of _____,
19— at _____.

If appearance is to be before a commissioner, change the words following "appear" to "before _____, United States Commissioner."
 2Insert place.

3Change "Court" to "Commissioner" if necessary. See Note 1.

4These lines are to provide for additional justification, if the Commissioner or Court so directs.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 17.

Cross-Reference.

Bail, Rule 46.

738. Information for Food and Drug Violation.

In the United States District Court
For the _____ District _____,
_____ Division

United States of America

v.

John Doe

} No. _____
 } (21 U. S. C. §§ 331, 333, 342)

The United States Attorney charges:

On or about the _____ day of _____, 19—, in the _____ District of _____, John Doe unlawfully caused to be introduced into interstate commerce by delivery for shipment from the city¹ of _____, _____ (State), to the city¹ of _____, _____ (State), a consignment of cans containing articles of food which were adulterated in that they consisted in whole or in part of decomposed vegetable substance.

_____,
United States Attorney.

¹Name of city is stated only to preclude a motion for a bill of particulars and not because such a statement is an essential fact to be alleged.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 11.

739. Summons.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____

To John Doe:

You are hereby summoned to appear before the District Court for the District of _____ at the Post Office Building in the city of _____ on the _____ day of _____, 19____ at 10 o'clock A. M. to answer to an information charging you with unlawful transportation of intoxicating liquor on which the internal revenue tax had not been paid.

Clerk.

By _____,
Deputy Clerk.

This summons was received by me at _____ on _____,

Defendant.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 13.

Cross-Reference.

Summons on indictment or information, Rule 9(b) (2).

740. Motion by Defendant to Dismiss the Indictment.

In the United States District Court
For the _____ District of _____,
_____ Division

United States of America

v.

} No. _____

John Doe

The defendant moves that the indictment be dismissed on the following grounds:

1. The court is without jurisdiction because the offense if any is cognizable only in the _____ Division of the _____ District of _____.

2. The indictment does not state facts sufficient to constitute an offense against the United States.

3. The defendant has been acquitted (convicted, in jeopardy of conviction) of the offense charged therein in the case of United States v. _____ in the District Court for the _____ District of _____, Case No. _____ terminated on _____.

4. The offense charged is the same offense for which the defendant was pardoned by the President of the United States on _____ day of _____, 19____.

5. The indictment was not found within three years next after the alleged offense was committed.

Signed: _____,

Address.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 19.

Cross-References.

Motion to dismiss, Rule 6(b) (2).
Pleadings and motions before trial,
Rule 12.

NOTES TO DECISIONS

Motions to dismiss are restricted to an objection which is capable of determination without trial of the general issues, and hence matters which might be re-

ceived as evidence on trial will not be considered. U. S. v. Hearne, (DC-Wis), 6FedRDec294.

740A. Motion to Dismiss Indictment on Objection to the Array of Grand Jury or to Individual Jurors.

In the United States District Court

For the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____

The defendant moves that the indictment be dismissed on the following grounds:

1. The grand jury which returned the indictment was not (selected) (drawn) (summoned) in accordance with law.
2. AB, CD and EF, members of the grand jury, were not legally qualified in that [they were not residents of said district].
3. Unauthorized persons were present while the grand jury was (deliberating) (voting).

Signed: _____

Attorney for defendant.

Address: _____

Cross-References.

Persons who may be present while grand jury in session, Rule 6(d).

Secrecy of grand jury proceedings, Rule 6(e).

NOTES TO DECISIONS

The actual paneling of the grand jurors should be in open court. In re Impaneling of Grand Jury, (DC-NY), 4 FedRDec382.

740B. Order Dismissing Indictment.

(Caption.)

This cause having come on for hearing on a motion to dismiss the indictment and after hearing the attorney for the defendant in support of the motion and _____ assistant United States attorney, in opposition thereto, and the court being duly advised in the premises, it is

Ordered, that the motion to dismiss the indictment herein be and it is hereby sustained, and said indictment is hereby dismissed; and it is further

Ordered, that the defendant _____ be and he is hereby discharged from custody.

Date _____

United States district judge.

741. Application for Warrant of Removal.

(Caption.)

To Judge of the United States District Court for the Northern District of Illinois;

The United States of America, by _____, United States attorney for the aforesaid district, respectfully shows as follows:

On _____ 19—, the grand jury of the United States in and for the Southern District of New York returned an indictment in the District Court for that district, charging John Doe with [general description of the crime in the indictment] in violation of the Act of Congress of _____, and the said John Doe now stands so indicted. A certified copy of the said indictment is submitted with this application and made a part thereof.

Said John Doe not having been found within the Southern District of New York, and it appearing that he has fled to and is at present within your district, and was apprehended in your district by virtue of a warrant issued by _____; and the said John Doe having been brought before said _____ Esq., United States Commissioner for this district for hearing, and the said commissioner, after due consideration, having committed him to the custody of the marshal for your district pending his removal to the Southern District of New York for trial upon said indictment in the District Court thereof, petitioner respectfully prays that this court may issue its warrant ordering the removal of the said John Doe to the Southern District of New York for trial upon the said indictment.

United States attorney

Date _____.

741A. Warrant of Removal on Indictment.

In the United States District Court
For the _____ District of _____,
_____ Division

To _____:

The grand jury of the United States for the _____ District of _____ having indicted John Doe on a charge of murder in the first degree, and John Doe having been arrested in this District and, after (waiving) hearing, having been committed by a United States Commissioner to your custody pending his removal to that district,

You are hereby commanded to remove John Doe forthwith to the

_____ District of _____ and there deliver him to the United States Marshal for that District or to some other officer authorized to receive him.

United States District Judge.

Dated at _____ this _____ day of _____ 19____.

Source of Form.

Federal Rules of Criminal Procedure, Appendix of Forms, Form 14.

Indictment Basis of Removal.

If the basis on which removal is sought is an indictment in another district the indictment constitutes con-

clusive proof of reasonable cause, and the only matter left open is the issue of identity, namely, whether the person sought to be removed is the person named in the indictment. *Hemans v. Matthews* (DC-D. of C.) 6F.R.D.3.

741B. Warrant of Removal on Complaint or Information.

United States District Court

_____ District of _____

_____ Division

United States of America

v.

} No. _____

To _____:

A ¹complaint having been filed before _____ for the information

_____ District of _____ charging _____ with violation of _____ in that he did _____

and the above named defendant having been arrested in this District and, after waiving² hearing, having been committed by a United States Commissioner³ to your custody pending removal to that district, _____.

You are hereby commanded to remove the above named defendant forthwith to the _____ District of _____ and there deliver h to the United States Marshal for that District or to some other officer authorized to receive h .

United States District Judge.

Dated at _____ this _____ day of _____ 19____.

¹Strike word not applicable.

²Strike "waiving" if hearing was had.

³If commitment was not by a U. S. Commissioner strike out words "by a United States Commissioner."

UNITED STATES MARSHAL'S RETURN

District of _____ ss

Received the within warrant of removal the _____ day of _____
19— and executed same.

U. S. Marshal.

By _____,
Deputy Marshal.

Cross-Reference.

Commitment in another district, removal, Rule 40(a) (6).

742. Bench Warrant—Violation of Probation.

To the Marshal of the United States for the _____ District of _____,
and to His Deputies, or Any or Either of Them:

WHEREAS, the District Court of the United States of America for the _____ District of _____, in the _____ Circuit, on _____ suspended the execution of sentence of _____ and placed him on probation.

AND, WHEREAS, satisfactory evidence having been presented that said probationer has violated the conditions of his probation, the above-named Court has on _____ ordered a warrant for his/her arrest, pursuant to Title 18, § 3653 of the United States Code.

NOW, THEREFORE, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said _____ and bring him/her before the said Court, at the United States Court-house in the City of _____

WITNESS, The Hon. _____ Judge of the District Court of the United States for the _____ District of _____, _____ in the City of _____ the _____ day of _____, in the year of our Lord one thousand nine hundred and _____.

Clerk.**743. Application for Transfer from one Division to Another Within the District.**

(Caption.)

John Doe, the above named defendant, who is accused of _____ by (information) (indictment) now pending in the _____ Division of this District, hereby applies for a transfer of this cause to the _____ Division of said District and consents to arraignment, entry of plea, trial and sentence, if any shall be imposed, in said last mentioned division.

_____,
Defendant.

_____,
Witness.

_____,
Attorney for defendant.

Cross-Reference.

Transfer within the district, Rule 19.

743A. Order Transferring Case from one Division to Another Within the District.

(Caption.)

Defendant herein having applied for transfer of the above entitled cause to the _____ Division of this District and consented to prosecution therein, it is

Ordered, that the application is granted and the clerk is directed to transmit all the papers in the case, under the seal of this court, to the said _____ Division of this District for prosecution and disposition of the case.

_____,
United States district judge.

Date _____

744. Motion by one Defendant to Transfer Proceedings to Another District or Division.

(Caption.)

AB, one of the defendants in the above entitled cause, moves this court to transfer the proceeding as to him from this (division) (district) to the _____ Division of the _____ District of _____, on the ground that the indictment charges that the offense was committed in both of said divisions and all of the known witnesses in behalf of the defendant reside at _____.

_____,
Attorney for defendant.

_____,
Address.

Cross-References.

Offense committed in two or more districts or divisions and proceedings on transfer, Rule 21(b) (c).

Time of motion to transfer, Rule 22.

745. Motion for Bill of Particulars.

(Caption.)

Comes now the defendant, AB, and moves for a bill of particulars, stating the following particulars as to the matters alleged in the indictment:

1. The time, place, and circumstances and with whom the defendant, AB, devised the scheme to defraud referred to in said indictment, and the names of the persons with whom he devised and intended to devise said scheme to defraud.

2. The time when, the place where, and circumstances under which he made any false or fraudulent pretenses, to obtain money from the insurance companies named in the indictment, and the time when, place where, circumstances under which, and the persons with whom, he was acting and the persons representing said insurance companies with whom he is alleged to have negotiated for the purpose of obtaining money, and the insurance companies to whom such fraudulent pretenses were made.

3. The false and fraudulent claims the settlement of which defendant is charged to have procured, the persons by whom they were held, the names of the companies against whom they were presented, and the time, place, and circumstances under which the defendant, AB, participated to any extent therein.

* * *

The grounds for said motions are as follows: The defendant can not properly prepare his defense without the aforesaid information, as the allegations of the indictment are in general terms and are not sufficiently specific.

Date _____.

Attorney for defendant, AB.

Address.

745A. Order for Bill of Particulars.

(Caption.)

This cause came on for hearing on defendant's motion for a bill of particulars, and the court having been duly advised in the matter, it is

Ordered, that the government shall, within _____ days after service of a copy of this order, file and serve a bill of particulars in the following respects:

1. _____.
2. _____.
3. _____; and it is further

Ordered, that the _____ and _____ requests for particulars are denied.

Date _____.

United States district judge.

Cross-Reference.

Bill of particulars, Rule 7(f).

746. Motion to Strike Surplusage from Indictment.

(Caption.)

The defendant moves the court to strike the following matter from the indictment as surplusage on the ground that such matter is (immaterial) (irrelevant) and prejudicial:

1. _____.
2. _____.
3. _____.

_____,
Attorney for defendant._____,
Address.**Cross-Reference.**

Right to strike surplusage on motion,
Rule 7(d).

747. Motion for Suspension of Proceedings on Ground of Insanity.

(Caption.)

Defendant moves the court for a suspension of the above entitled cause on the ground that he is presently insane or mentally incompetent to understand the nature of the proceedings against him and properly to assist in his own defense.

_____,
Attorney for defendant.**748. Waiver of Trial in District in Which Indictment is Pending.**

(Caption.)

John Doe, the above named defendant, having received a copy of the (information) (indictment) charging him with violating the _____ Act, which is now pending against him in the (_____) Division of the) _____ District of _____, hereby states that he wishes plead (guilty) (nolo contendere) to the charge, to waive trial in the district (and division) in which the case is now pending and consents to disposition of the case in the (_____) Division of the) _____ District of _____.

_____,
Defendant.

Approved: _____
United States attorney for the
_____ District of _____.

United States attorney for the
 _____ District of _____.

_____,
 Witness.

_____,
 Attorney for defendant.

Cross-Reference.

Transfer from the district for plea and sentence, Rule 20.

NOTES TO DECISIONS

Nolo Contendere.

Where the accused stated that he wished to plead nolo contendere and waive trial in the district in which the indictment was pending as permitted by rule 20, but the court after transfer of

the papers refused to receive the plea of nolo whereupon the accused entered a plea of guilty, the court was not ousted of jurisdiction. Singleton v. Glemmer, —App.D.C.—, 166 F. (2d) 963.

749. Motion for Change of Venue on Ground of Prejudice.

(Caption.)

The defendant moves the court for an order transferring the above entitled cause from this (district) (division) to the _____ Division of the _____ District of _____, on the ground that the prejudice against him is so great that he does not believe that he can obtain a fair trial in this _____.

_____,
 Attorney for defendant.

_____,
 Address.

Cross-Reference.

Change of venue, Rule 21(a).

NOTES TO DECISIONS

Discretion of Trial Court.

The trial court did not abuse its discretion by denial of a change of venue for local prejudice where the alleged

offense had nation wide newspaper and radio publicity. Kersten v. U. S. (CCA 10), 161 F (2d) 337; Shockley v. U. S. (CCA9), 166 F (2d) 704.

749A. Order Granting Motion for Change of Venue.

(Caption.)

This cause was heard on motion by defendant for change of venue on the ground of prejudice and the court being fully advised, it is

Ordered, that the above entitled cause be transferred to the _____
 Division of the _____ District of _____.

Date _____.

_____,
 United States district judge.

750. Consent by Defendant to Proceedings in His Absence.

(Caption.)

John Doe, above named defendant, hereby consents to his (arraignment) (entry of his plea) (trial) and (sentence, if any) in the above entitled cause, in his absence and hereby waives his right to be present at such proceedings.

_____,
Defendant.

_____,
Witness.

_____,
Attorney for defendant.

Cross-Reference.

Presence of defendant, Rule 43.

750A. Consent to Trial Before United States Commissioner.

United States District Court

_____ District of _____

_____ Division

Commissioner's Docket No. _____

Case No. _____

United States of America
v.

Consent to be Tried
By United States
Commissioner

I, _____, charged with _____

here insert brief description of offense

a petty offense against the laws of the United States on a Federal Reservation, in the _____ Division of the _____ District of _____, appearing before _____, United States Commissioner, who has fully apprised me of my right to elect to be tried in the District Court of the United States which has jurisdiction of the offense, and explained to me the consequences of this consent, do hereby consent to be prosecuted before the commissioner on the charge hereinbefore stated, as authorized by Title 18, Sections 3401, 3402 of the United States Code.

Dated _____, 19____.

_____,
Defendant.

_____,
Witness.

751. Affidavit for Search Warrant.

United States District Court

____ District of _____

____ Division

Commissioner's Docket No. _____

Case No. _____

United States of America

v.

} Affidavit for
Search Warrant

BEFORE _____, _____

Name of Commissioner

Address of Commissioner

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the person of) _____
(is positive) (on the premises known as) _____

_____ in the _____ District of _____,

there is now being concealed certain property, namely _____

here describe property

which are _____

here give alleged grounds for search and seizure

And that the facts tending to establish the foregoing grounds for issuance
of a Search Warrant are as follows:_____
Signature of Affiant._____
Official Title, if any.

Sworn to before me, and subscribed in my presence, _____, 19____.

United States Commissioner.

Cross-Reference.

Search and seizure, Rule 41.

751A. Search Warrant (Under Rule 41).

To _____:

Affidavit having been made before me by John Doe that he has reason to
believe that on the premises known as _____ Street, in the city
of _____, in the District of _____, there is now being con-

cealed certain property, namely, certain dies, hubs, molds and plates, fitted and intended to be used for the manufacture of counterfeit coins of the United States, and as I am satisfied that there is probable cause to believe that the property so fitted and intended to be used is being concealed on the premises above described,

You are hereby commanded to search the place named for the property specified, serving this warrant and making the search in the daytime, and if the property be found there to seize it, prepare a written inventory of the property seized and bring the property before me.

Dated this _____ day of _____.

_____,
U. S. Commissioner for the _____

District of _____.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 15.

Cross-Reference.

Search and Seizure, Rule 41.

NOTES TO DECISIONS

Defendant Without Interest in Property Seized.

The rule to the effect that one could not complain of an unlawful search and seizure unless he had a proprietary interest in the property wrongfully seized has been abrogated by the words, "shall not be admissible in evidence at any hearing or trial," found in subdiv. (e) (5) of this rule. U. S. v. Janitz, (DC-NJ), 6FedRDec1.

Probable Cause.

Probable cause for the issuance of a search warrant necessarily implies, not simply that there are reasonable grounds to believe that some violation of the law exists, but that there is a violation in respect to some property located on some premises or on some person, which can be unmistakably identified so as to be capable of being particularly described in the warrant from information in the affidavit. Lowrey v. U. S. (CCA8), 161 F (2d) 30.

751B. Motion for the Return of Seized Property and the Suppression of Evidence.

In the United States District Court
For the _____ District of _____,
_____ Division
No. _____

John Doe hereby moves this Court to direct that certain property of which he is the owner, a schedule of which is annexed hereto, and which on the night of _____, 19____, at the premises known as _____ Street, in the city of _____, in the District of _____, was unlawfully seized and taken from him by two deputies of the United States Marshal for this district, whose true names are unknown to the petitioner, be returned to him and that it be suppressed as evidence against him in any criminal proceeding.

The petitioner further states that the property was seized against his will and without a search warrant.

Attorney for Petitioner.

NOTES TO DECISIONS

In General.

This form apparently does not go as far as the language of the rule clearly permits. U. S. v. Janitz (DC-NJ), 6 FRD 1.

Contraband.

Contraband, not subject to return, which is seized in violation of the Fourth Amendment, may be suppressed upon application before trial or indictment. In re Fried (CCA2), 161 F (2d) 453.

Discretion of Court.

Under rule 41 the court retains discretion to entertain a motion at the trial or hearing for the return and suppression of anything obtained by an unlawful search and seizure. U. S. v. Di Re, (CCA2), 159F(2d)818; Application of Fried, (DC-NY), 68FSupp961.

751C. Order Suppressing Evidence and Directing Return of Seized Property.

(Caption.)

This cause was heard on motion of _____ for an order suppressing as evidence certain property belonging to the said _____, which was seized on _____, 19—, by _____, at _____, and it appearing to the court that said property was obtained by an unlawful search and seizure, it is

Ordered, that the property consisting of _____ be and it is hereby suppressed and excluded as evidence herein and that the same be returned to the said _____.

Dated _____.

United States district judge.

752. Motion by Defendant to Take Deposition.

(Caption.)

The defendant moves the court for leave to take the deposition of AB, whose address is _____, on the following grounds:

1. AB is a prospective witness for the defendant and it now appears probable that he will be unable to attend the trial of this cause, for the reason that (he is in the military service of the United States and has been ordered to proceed abroad on a permanent change of station) (he is aged and infirm and presently confined to the _____ hospital).

2. The testimony of the said AB is material and necessary to prevent a failure of justice in that he was constantly in the company of the defendant during the entire evening on which the offense charged in the indictment

ment is alleged to have occurred and will testify that defendant was not present at the scene of the alleged offense.

Signed: _____

Attorney for defendant.

Address: _____

752A. Notice of Motion.

To _____

United States attorney for the
_____ District of _____.

Please take notice that the undersigned will bring the above motion on for hearing before this court at room _____, United States Courts and Post Office Building, in the city of _____, on the _____ day of _____, 19____, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: _____

Attorney for defendant.

Address: _____

Cross-Reference.

Depositions, taking and use, Rule 15.

752B. Order Granting Leave to Take Deposition.

(Caption.)

This cause came on for hearing on motion of defendant for leave to take the deposition of AB, and the court, being duly advised in the premises, it is hereby

Ordered, that the motion is granted and the defendant is hereby granted leave, upon due notice to opposing counsel, to take the deposition of AB, whose address is _____.

Date _____.

United States district judge.

752C. Notice to Take Deposition.

(Caption.)

To _____

United States attorney for the
District of _____.

Please take notice that pursuant to leave granted by order of this court dated _____, 19____, the undersigned will take the deposition

of CD, whose address is _____, at 10 o'clock A.M. on _____,
19—, at (address), before _____, a notary public.

_____,
Attorney for defendant.

_____,
Address.

Cross-Reference.

Notice of intention to take depositions,
Rule 15(b).

752D. Motion to Shorten or Extend Time for Taking of Deposition.

(Caption.)

The (government) (defendant) moves this court for an order directing that the deposition of _____, referred to in the notice served by (defendant) (government) and dated _____, 19—, pursuant to order of this court dated _____, 19—, be not taken on the date specified in said notice but shall be taken on the _____ day of _____, 19—, for the reason that counsel for the moving party will be engaged in the trial of a cause entitled _____ v. _____ before the United States District Court at _____, _____, on the date specified in said notice and will, therefore, be unable to attend the taking of said deposition.

_____,
Attorney for _____.

752E. Order Changing Time of Taking Deposition.

(Caption.)

This cause was heard on motion of _____ for a change in the time of taking the deposition referred to in the notice served herein by _____, dated _____, 19—, and the court being fully advised, it is

Ordered, that the motion is granted and the date specified in said notice for the taking of the deposition is hereby changed to _____, 19—.

Date _____.

_____,
United States district judge.

752F. Order Directing Payment of Expense of Taking Deposition.

(Caption.)

Defendant in the above entitled action, having been granted leave to take the deposition of AB by order of this court dated _____,

19—, and it appearing that the said defendant is unable to bear the expense thereof, it is hereby

Ordered, that the expenses of travel and subsistence of defendant's attorney, _____, for attendance at the examination shall be paid by the government and the marshal shall make payment accordingly.

Date _____.

United States district judge.

Cross-Reference.

Defendant's counsel and payment of expenses, Rule 15(c).

752G. Motion by Witness to Have His Deposition Taken.

(Caption.)

The undersigned, _____, having been committed for failure to furnish bail to appear to testify as a witness at a trial or hearing in the above cause, moves this court to direct that his deposition be taken, for the reason that he has insufficient funds to enable him to furnish or produce bail and his continued detention will result in great hardship to him and his family.

(Signature of witness)

Notice of Motion

To _____
United States attorney for the
_____ District of _____.

To _____
Attorney for defendant.

Address.

Please take notice that the undersigned will bring the above motion on for hearing before this court at room _____ (name and location of building), on the _____ day of _____, 19—, at 10 o'clock in the forenoon of that day or as soon thereafter as the matter may be heard.

(Signature of witness)

753. Motion by Defendant for Discovery and Inspection.

(Caption.)

The defendant moves the court to direct the attorney for the government to permit the defendant to inspect and copy or photograph the following books, papers, documents and objects which (were obtained from) (belonged to) the defendant) (were obtained from _____ by (seizure)

(process)) on the ground that such discovery is necessary for the proper preparation of his defense:

1. (Describe items accurately).
2. _____.
3. _____.
4. _____.
5. _____.

_____,
Attorney for defendant.

_____,
Address.

Cross-Reference.

Discovery and inspection, Rule 16.

754. Order to Permit Inspection of Documents, etc.

(Caption.)

This cause was heard on defendant's motion to require the attorney for the government to permit the defendant to inspect and copy or photograph certain books, papers, documents and objects, and the court being fully advised, it is

Ordered, that the attorney for the government is hereby directed to permit defendant or his attorney or agent to inspect and copy or photograph the following material at the office of _____, at _____, during office hours, beginning _____, 19—.

1. _____.
2. _____.
3. _____.

_____,
United States district judge.

755. Motion to Withdraw Plea of Guilty.

(Caption.)

Defendant moves the court for leave to withdraw his plea of (guilty) (nolo contendere) entered herein on the _____ day of _____, 19—, on the following grounds:

1. Defendant now believes that his action in entering a plea of guilty was improvidently taken in that _____.

2. Since date of arraignment defendant has received information concerning the availability of witnesses whose testimony will establish his innocence.

_____,
Attorney for defendant.

_____,
Address.

Cross-Reference.

Withdrawal of plea of guilty or of nolo contendere, Rule 32(d).

NOTES TO DECISIONS

Discretion of Court.

A motion for leave to withdraw plea of guilty is addressed to the court's discretion, and the action of the court will be reversed only if discretion was abused. U. S. v. Mignogna, (CCA2), 157F(2d) 839.

Laches.

Motion to withdraw, entered more than six months after plea of guilty, was too late. U. S. v. Harris, (CCA2), 160 F (2d) 507.

756. Waiver of Trial by Jury.

(Caption.)

The defendant, _____, hereby waives trial by jury herein and consents to trial by the court without a jury.

_____,
Defendant.

Consent _____
United States attorney for the
_____ District of _____.

Approved _____
United States district judge.

Cross-References.

Right to trial by jury, Rule 23(a).
Trial without jury, Rule 23(c).

757. Stipulation for Jury of Less Than Twelve.

(Caption.)

Stipulation

It is hereby stipulated by the defendant, his attorney, and the government that the above entitled case may be (tried by) (submitted to) a jury consisting of _____ members.

_____,
Defendant.

_____,
Attorney for defendant.

Approved: _____

United States district judge.

_____,
United States attorney for the

_____, District of _____.

Cross-Reference.

Jury of less than twelve, Rule 23(b).

758. Motion for Separate Trial of Offenses.

(Caption.)

The defendant moves the court to grant him a separate trial on each of the counts of the indictment for the following reasons:

1. Joint trial of both counts of the indictment would result in prejudice to the defendant in that _____.

2. The offenses charged in the several counts of the indictment are wholly unrelated.

3. None of the witnesses competent to testify in the trial of one count would be competent to testify in the trial of the other.

Signed: _____

Attorney for defendant.

Address: _____

Cross-References.

Joinder of offenses, Rule 8(a).

Relief from prejudicial joinder, Rule 14.

759. Motion for Severance of Defendants.

(Caption.)

The defendant, AB, moves the court to grant him a separate trial on the offenses charged in the indictment for the following reasons:

1. Joint trial of defendant, AB, with defendants, CD and EF, would result in prejudice to the said AB in that _____.

2. The trial of defendant AB can most conveniently be held at _____, whereas the trial of defendants CD and EF can most conveniently be held at _____.

3. Defendant AB is prepared to stand trial immediately, whereas the trial of defendants CD and EF cannot be held at the present term of court.

Signed: _____

Attorney for defendant.

Address: _____

Cross-Reference.

Joinder of defendants, Rule 8(b).

NOTES TO DECISIONS

Discretion of Court.

The granting or denial of a severance or separate trial to defendants jointly

indicted rests in the sound discretion of the trial court. Shockley v. U. S., (CCA 9), 166 F (2d) 704.

Severance Denied.

Where all defendants are charged with having participated in the same transaction, their joinder for trial and the

overruling of a motion for severance was proper. U. S. v. Needleman, (DC-NY), 6 FedRDec205.

760. Praecept for Subpoena other than on Behalf of United States.

United States District Court

_____ Division, _____ District of _____

_____ vs. _____

} No. _____

To the Clerk of said Court:

Please issue Subpoena for _____

to appear as witness _____ on behalf of _____ on the _____ day of _____, A. D. 19____, at _____ o'clock _____ M.

Subpoena issued _____, 19____

Attorney for _____

760A. Praecept for Subpoena on Behalf of United States.

United States District Court

_____ Division, _____ District of _____

The United States of America

vs. _____

} No. _____

The Clerk of said Court will issue Subpoena for the following-named persons to appear before said Court, at the United States Court Rooms, in _____, at _____ o'clock, _____ M., on the _____ day of _____, 19____, then and there to testify in behalf of the United States:

Names

Addresses

This _____ day of _____, 19____

Subpoena issued: _____, 19____ United States Attorney.

Cross-Reference.

Fees of marshal, U. S. C. Tit. 28, §§ 553, 1921.

760B. Subpoena to Testify.

In the United States District Court
 for the _____ District of _____, _____ Division
 TO _____:

You are hereby commanded to appear in the United States District Court
 for the _____ District of _____ at the Courthouse,
 in the city of _____, on the _____ day of _____
 _____, 19— at 10 o'clock A. M. to testify in the case of the United
 States v. John Doe.

This subpoena is issued on application of the (United States) (defendant).

 Clerk.

By _____,
 Deputy Clerk.

Source of Form.

Federal Rules of Criminal Procedure,
 Appendix of Forms, Form 20.

Cross-Reference.

Subpoena and service thereof, Rule
 17(a), (d), (e)(1), (2).

760C. Commissioner's Subpoena.

United States District Court
 _____ District of _____
 _____ Division

Commissioner's Docket No. _____

Case No. _____

United States of America
 v.

} Subpoena

 To _____

name of witness

You are hereby commanded to appear before the undersigned United
 States Commissioner _____ at _____ on the _____
 day of _____, 19— at _____ o'clock—, M. to testify in the
 above entitled proceeding.

This subpoena is issued on application of _____.

Date: _____, 19—.

United States Commissioner.

RETURN

This subpoena was received by me on _____, 19—, and was
 served in the following manner: _____

Name.

Title.

Cross-Reference.

Service of subpoena, Rule 17(d).

761. Warrant for Arrest of Witness.

In the United States District Court

for the District of Division

v.

No. _____

To _____

You are hereby commanded to arrest John Doe and bring him forthwith before the District Court for the _____ District of _____ in the city of _____, for the reason that he wilfully failed to appear after having been served with subpoena to appear at the trial of the case of United States v. Roe on the _____ day of _____, 19__.

You are further commanded to detain him in your custody until he is discharged by the Court.

Upon order of Honorable _____, United States District Judge
at _____ this _____ day of _____, 19__.

Clerk.

By

Deputy Clerk.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 22.

Cross-Reference.

Contempt, Rule 17g.

762. Subpoena to Produce Document or Object.

In the United States District Court

for the _____ District of _____, _____ Division

To _____

You are hereby commanded to appear in the United States District Court for the _____ District of _____ at the Courthouse, in the city of _____, on the _____ day of _____, 19— at 10 o'clock A. M. to testify in the case of United States v. John Doe and bring with you _____

This subpoena is issued upon application of the (United States) (defendant).

Clerk.

By _____,
Deputy Clerk.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 21.

Cross-Reference.

Subpoena duces tecum, Rule 17(c).

762A. Motion to Vacate Subpoena for Production of Documents.

(Caption.)

John Doe hereby moves this court to vacate the subpoena for the production of documents heretofore served on him and dated _____, 19—, commanding him to appear and testify herein on _____, 19—, and to bring with him certain documents and objects, on the ground that said subpoena is unreasonable and oppressive in that _____.

Attorney for petitioner.

763. Motion by Indigent Defendant for Issuance of Subpoena.

(Caption.)

The defendant moves this court for an order directing the issuance and service of subpoenas, at government expense, for the attendance at the trial of this cause of the witnesses listed in the attached affidavit for reasons which more fully appear therein.

Attorney for defendant.

Address.

763A. Affidavit in Support of Motion by Indigent Defendant for Issuance of Subpoena.

United States District Court

(Caption.)

Affidavit of _____

County of _____ }
State of _____ } ss:

AB, being duly sworn according to law deposes and says:

1. He is the defendant in the above entitled cause.

2. The persons whom he requests be subpoenaed as witnesses at the trial, and the testimony each is expected to give if subpoenaed, are as follows:

(1) CD, whose address is _____, will testify _____.

(2) EF, whose address is _____, will testify _____.

3. The testimony of the above named persons is material and necessary for a proper defense to the offense charged, for the reason that _____

4. A true statement of his assets and liabilities is annexed.

5. His sole income is _____ dollars (\$_____) per _____ and he has a wife and three children who are wholly dependent upon him for support.

6. He does not have sufficient means and is unable to pay the cost of securing the appearance of such witnesses at the trial.

Sworn and subscribed to before me this _____ day of _____, 19____.

Notary public.

Cross-Reference.

Indigent defendants, Rule 17(b).

763B. Order Directing Issuance of Subpoena for Indigent Defendant.

(Caption.)

This cause came on for hearing on motion of defendant for an order directing the issuance of subpoenas for the appearance of _____ and _____ as witnesses at the trial and the court being fully advised, it is

Ordered, that the motion is hereby granted and the clerk is directed to issue subpoenas for said witnesses, costs and fees therefor to be paid as in the case of witnesses subpoenaed in behalf of the government.

United States district judge.

764. Motion for Judgment of Acquittal.

(Caption.)

Defendant moves the court for a judgment of acquittal on the ground that the evidence presented by the government is insufficient to sustain a conviction.

Attorney for defendant.

Cross-References.

Motion for acquittal, Rule 29(a).

Reservation of decision on motion, Rule 29(b).

NOTES TO DECISIONS

If there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, motion

for directed verdict of acquittal must be granted. *Curley v. U. S.*, 81 AppDC 389, 160 F (2d) 229.

764A. Judgment of Acquittal.

(Caption.)

This cause came on for trial before the court and jury, and the evidence presented by the (government) (and the defendant) having been heard, and the defendant having moved for a judgment of acquittal, it is

Adjudged, that the defendant is hereby acquitted and that he be released from custody.

Date _____

United States district judge.**766. Motion for New Trial.**

In the United States District Court

for the _____ District of _____, _____ Division

United States of America

v.

John Doe

} No. _____

The defendant moves the court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion for acquittal made at the conclusion of the evidence.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in sustaining objections to questions addressed to the witness Richard Roe.
5. The court erred in admitting testimony of the witness Richard Roe to which objections were made.
6. The court erred in charging the jury and in refusing to charge the jury as requested.
7. The defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances: the attorney for the government stated in his argument that the defendant had not taken the witness stand and that the defendant had been convicted of crime.
8. The court erred in denying the defendant's motion for a mistrial.

Attorney for Defendant.**Source of Form.**

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 23.

Cross-Reference.

New trial, Rule 33.

767. Motion for New Trial for Newly-Discovered Evidence.

(Caption.)

Defendant moves this court for an order directing a new trial herein on the ground that defendant has discovered material evidence which could

not with due diligence have been obtained for use at the trial of this case, to-wit: (Here insert).

Attorney for defendant.

Address.

Date_____.

768. Order Granting Motion for New Trial.

(Caption.)

This cause was heard on motion of defendant for a new trial and after hearing counsel and the court being fully advised it is

Ordered, that the verdict herein be and it is hereby set aside and defendant's motion for a new trial is hereby granted.

United States district judge.

Date_____.

769. Judgment and Commitment.

In the United States District Court
for the _____ District of _____,
_____ Division

United States of America
v. _____

} No. _____

JUDGMENT AND COMMITMENT

On this _____ day of _____, 19____, came the attorney for the government and the defendant appeared in person and ¹ _____

It is Adjudged that the defendant has been convicted upon his plea of² _____ of the offense of _____ as charged³ _____; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ⁴ _____

It is Adjudged that⁵ _____

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

United States District Judge.

The Court recommends commitment to:⁶_____

Clerk.

[Endorsement]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____.

Defendant noted appeal on _____.

Defendant released on _____.

Defendant elected, on _____, not to commence service of the sentence.

Defendant's appeal determined on _____.

Defendant delivered on _____ to _____ at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

United States Marshal.

¹Insert "by counsel" or without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

²Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

³Insert "in count(s) number _____" if required.

⁴Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law.

⁵Enter any order with respect to suspension and probation.

⁶For use of Court wishing to recommend a particular institution.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 25.

Cross-Reference.

Sentence and judgment, Rule 32(a),
(b).

NOTES TO DECISIONS

Prima Facie Evidence.

A recital in the judgment of the several steps taken by the court in the progress of the case would be prima facie evidence that the steps set forth therein actually took place, but it does

not follow that a failure to make such a recital in the written judgment nullifies steps that in fact did occur. *Sanders v. Johnston*, (CCA9), 165 F (2d) 736.

769A. Judgment and Commitment in Petty Offense Cases.

United States District Court

For the _____ District of _____

_____ Division

Commissioner's Docket No. _____

Case No. _____

United States of America

v.

| | |
|---|------------|
| } | Judgment |
| | and |
| | Commitment |

On this _____ day of _____, 19— came the attorney for the government and the defendant appeared in person and¹—

It Is Adjudged that the defendant has been convicted upon his plea of²—

_____ of the offense (s) of _____

as charged³ _____ and the commissioner having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing.

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴—

It Is Adjudged that⁵—

It Is Ordered that a certified copy of this judgment and commitment be delivered to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

United States Commissioner.

A True Copy. Certified this _____ day of _____

(Signed) _____,

U. S. Commissioner.

¹Insert "by counsel" or without counsel; the commissioner advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed, and the defendant thereupon stated that he waived the right to the assistance of

counsel." ²Insert (1) "guilty," (2) "not guilty, and a finding of guilty," or (3) "nolo contendere," as the case may be. ³Insert "in count (s) number _____" if required. ⁴Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. ⁵Enter any order with respect to suspension and probation.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____.

Defendant noted appeal to district court on _____.

Defendant released on _____.

Defendant elected, on _____ to enter upon service of the sentence.

Defendant's appeal determined on _____.

Defendant delivered on _____ to _____ at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

United States Marshal.

770. Motion in Arrest of Judgment.

In the United States District Court

for the _____ District of _____, _____ Division

United States of America

v.

John Doe

No. _____

The defendant moves the court to arrest the judgment for the following reasons:

1. The indictment does not state facts sufficient to constitute an offense against the United States.

2. This court is without jurisdiction of the offense, in that the offense if any was not committed in this district.

Attorney for Defendant.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 24.

Cross-Reference.

Arrest of judgment, Rule 34.

NOTES TO DECISIONS

Defect Appearing on Face of Record.

A motion in arrest of judgment may be maintained only for a defect appearing upon the face of the record, and the

evidence is no part of the record. Sutton v. U. S., (CCA5), 157F(2d)661; U. S. v. Lee, (DC-Hawaii), 6FedRDec456.

771. Order Granting Motion in Arrest of Judgment.

(Caption.)

This cause was heard on defendant's motion in arrest of judgment and after hearing counsel and the court being fully advised it is

Ordered, that defendant's motion in arrest of judgment herein be and it is hereby granted and the verdict herein be and it is hereby set aside.

_____,
United States district judge.

Date_____.

772. Motion to Correct Illegal Sentence.

(Caption.)

Defendant moves the court to correct the sentence imposed on him by judgment of this court dated _____, 19—, on the ground that said service is illegal for the following reasons:

1. The sentence imposed a fine in excess of the maximum provided by law. (cite statute)
2. The sentence imposed a term of imprisonment for a period in excess of the maximum provided by law. (cite statute)

Attorney for defendant.

Cross-Reference.

Correction or reduction of sentence,
Rule 35.

NOTES TO DECISIONS**Sentence Served.**

Erroneous sentence which has been served is not subject to correction. U. S. ex rel. Quinn v. Hunter, (CCA7), 162 F (2d) 644.

Terms of Court Abolished.

The rules abolish terms of court and specify periods of time within which applications for various relief must be made. U. S. v. Claus, (DC-NY), 5Fed RDec278.

772A. Notice of Appeal from United States Commissioner to District Court.

In the United States District Court
For the _____ District of _____

United States of America

v.

} Appeal from the Judgment and Sen-
tence of — United States Com-
missioner.

Name and address of appellant_____

Name and address of appellant's attorney_____

Offense: [Here insert general statement of nature of offense].

Date of judgment ———, 19—.

Brief description of judgment or sentence: [Here insert].

Name of prison where now confined, if not on bail —.

I, the above-named appellant, hereby appeal to the United States District Court for the — District of — from the judgment above-mentioned on the grounds set forth below.

(Signed) _____

Appellant.

Date —.

Grounds of appeal: [Here set forth grounds].

Source of Form.

Rule 4 of Rules of Procedure and Practice for the Trial of Cases (Criminal) before the Commissioner.

773. Motion to Reduce Sentence.

(Caption.)

Defendant moves the court to reduce the sentence imposed herein by the judgment of this court dated ———, 19—, for the following reasons:

1. The sentence as imposed is believed to be exceedingly excessive in view of defendant's age, the fact that this was his first offense and the further fact that he freely admitted his guilt, at a great saving of time and expense to the government.

2. Since imposition of the sentence, defendant has made full restitution of the funds which he embezzled.

3. Because of defendant's advanced age and the condition of his health, as shown by the attached statement by his physician, his life expectancy is somewhat less than the period of confinement imposed by the sentence.

Attorney for defendant.

774. Application of Prisoner for Discharge.

United States District Court

—— District of ———

—— Division

Commissioner's Docket No. _____

Case No. _____

United States of America

v.

} Application for discharge from imprisonment (U. S. C. Title 18, Section 3569)

To _____, a United States Commissioner for the above named District.

I hereby apply for discharge from imprisonment in the _____

_____ and in support thereof state that I was convicted for a violation of United States Code, Title _____ Section _____, and was sentenced to _____

_____ here insert sentence _____ by the United States District Court for the _____ District of _____, _____, 19____, and was committed to the aforementioned place of confinement on the _____ day of _____, 19____, and that on the _____ day of _____, 19____, I will have been imprisoned for _____ days solely for non-payment of fine and costs which I am unable to pay.

Applicant.

Witness.

_____, 19____.
Date of application.

774A. Oath of Prisoner for Discharge from Imprisonment.

United States District Court

_____ District of _____

_____ Division

Commissioner's Docket No. _____

Case No. _____

United States of America

v.

} Oath of prisoner on application for
discharge from imprisonment

I, _____, do solemnly swear that I have not any property, real or personal, to the amount of twenty dollars, except such as is by law exempt from being taken on civil process for debt by the laws of _____ and that I have no property in any way conveyed or concealed, or in any way disposed of, for my future use or benefit. So help me God.

Subscribed and sworn to before me, this _____ day of _____, 19____.

U. S. Commissioner.

774B. Notice to U. S. Attorney of Application for Discharge of Prisoner

United States District Court

District of

- Division

Commissioner's Docket No. _____

Case No. _____

United States of America

V.

Notice of application for discharge of prisoner

To the United States Attorney for the _____ District of _____

You are hereby notified that on _____, 19____, pursuant to U.S.C. Title 18, Section 3569, _____ now imprisoned in _____
name of prisoner
the _____ at _____ by virtue of the
name of institution place
sentence of the United States District Court for the _____ Dis-
trict of _____ applied to me for discharge from confinement by
reason of inability to pay a fine. The application will be considered at
_____ on _____ at _____ o'clock—M.

U. S. Commissioner.

Date _____, 19____.

774C. Preliminary Order for Poor Convict.

United States District Court

District of

- Division

Commissioner's Docket No. _____

Case No. _____

United States of America

V.

Preliminary order to custodian of
place of confinement for poor
convict

To the custodian of _____:

(Name of Institution)

Whereas application has been made on the _____ day of _____, 19____, to me by _____ for discharge from imprisonment in _____

(Name of Institution)

under the provisions of Title 18, Section 3569 of the United States Code.

You are hereby commanded to deliver the custody of _____
 _____ and the commitment upon which his application is
 based to the United States Marshal of this District or to any of his
 deputies to be brought before me on the _____ day of _____
 _____, 19—, at _____ o'clock—M.

To the United States Marshal to execute.

Dated: _____, 19—.

 U. S. Commissioner.

RETURN

Received this Order on the _____ day of _____, 19—,
 at _____, and executed it by producing the designated prisoner
 as directed on the _____ day of _____, 19—.

 U. S. Marshal.

By _____,
 Deputy.

Dated: _____, 19—.

774D. Discharge from Imprisonment.

United States District Court

_____ District of _____

_____ Division

Commissioner's Docket No. _____

Case No. _____

United States of America

v.

} Certificate and order of discharge
 from imprisonment

I hereby certify that _____ has been imprisoned in the
 _____ for
 place of confinement

the period of _____ days, solely for the non-payment of a
 fine of \$ _____ and costs adjudged against him by the United States
 District Court for the _____ District of _____ on
 the _____ day of _____, 19—, for a violation of Title
 _____, Section _____ of the United States Code; that it appears to
 me that he is unable to pay the required amount and has no property
 exceeding \$20 in value except such as is by law exempt from execution
 for debt; and that he has taken the prescribed oath to that effect.

IT IS THEREFORE ORDERED that _____
be discharged from further imprisonment on the _____ day of _____,
19____.

Dated:

_____, 19____.

United States Commissioner.

775. Motion to Set Aside Forfeiture of Bail.

(Caption.)

John Doe, surety on the bond filed herein to insure the appearance of the defendant, _____, on the date set for the trial of the above entitled cause, which bond was declared forfeited by order of this court dated _____, 19____, hereby moves the court to set aside said forfeiture on the following grounds:

1. The breach of said bond occurred without fault of either the surety or principal in that _____.
2. Since the date of the forfeiture, defendant has minimized the effect of his default by voluntarily surrendering and pleading guilty to the offense charged.
3. Subsequent to the default, defendant was apprehended through the sole efforts of, and at great expense to, the surety.

Attorney for petitioner.

Cross-Reference.

Forfeiture, Rule 46(f).

775A. Motion to Remit Forfeiture.

(Caption.)

John Doe, surety on the bond filed in the above entitled cause on _____, 19____, to insure _____, hereby moves the court to remit the judgment of default entered herein and dated _____, 19____, on the following grounds:

1. _____.
2. _____.
3. _____.

Attorney for petitioner.

776. Stay of Execution.

(Caption.)

John Doe, above named defendant, having taken an appeal from the

judgment of conviction herein, hereby elects not to commence service of his sentence pending disposition of appellate proceedings.

Defendant.

Witness.

Attorney for defendant.

Cross-Reference.

Stay of execution, Rule (38)(a), (b).

777. Notice of Appeal.

In the United States District Court
for the _____ District of _____,
_____ Division

United States of America

v.

John Doe

} No. _____

Name and address of appellant _____.

Name and address of appellant's attorney _____.

Offense _____.

Concise statement of judgment or order, giving date, and any sentence _____.

Name of institution where now confined, if not on bail _____.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the _____ Circuit from the above-stated judgment.

Dated _____.

Appellant.¹

¹Or "Appellant's Attorney" or "Clerk" as the case may be.

Source of Form.

Federal Rules of Criminal Procedure,
Appendix of Forms, Form 26.

Cross-References.

Taking appeal, Rule 37(a).
Record on appeal, Rule 39(b), (c).

NOTES TO DECISIONS

Timeliness.

Notice of appeal filed more than
seventeen months after judgment of con-

viction was too late. U. S. v. Bloom,
(CCA2), 164 F (2d) 556.

778. Statement of Docket Entries.

In the United States District Court
 For the _____ District of _____,
 _____ Division

United States of America

v.

No. _____

John Doe

1. Indictment or information for _____
 _____ Filed _____, 19____
2. Arraignment _____, 19____
3. Plea to indictment or information _____
 _____, 19____
4. Motion to withdraw plea of guilty denied _____
 _____, 19____
5. Trial by jury, or by court if jury waived _____
 _____, 19____
6. Verdict or finding of guilt _____
 _____, 19____
7. Judgment—(with terms of sentence) or order _____
 _____ Entered _____, 19____
8. Notice of appeal filed _____, 19____

Dated _____

Attest _____,

Clerk.

Source of Form.

Federal Rules of Criminal Procedure,
 Appendix of Forms, Form 27.

779. Petition by Government for Certiorari in Supreme Court.

In the United States District Court

— Term, —

No. —

United States of America, Petitioner

v.

FD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
 APPEALS FOR THE — CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ
 of certiorari issue to review a judgment of the United States Court

of Appeals for the ——— Circuit, entered on ———, 19—, setting aside convictions under section 2 (f) of the Federal Firearms Act of 1938 [U. S. C., Title 15, § 902 (f)].

OPINION BELOW

The opinion of the Court of Appeals (R. ———) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on ———, 19— (R. ———). The jurisdiction of this court is invoked under United States Code, Title 28, § 1254.

See also, Rule 37 of Rules for Criminal Procedure for United States District Courts.

QUESTION PRESENTED

Whether section 2 (f) of the Federal Firearms Act [U. S. C., Title 15, § 902 (f)], which provides that the possession of a firearm or ammunition by "any person who has been convicted of a crime of violence or is a fugitive from justice * * * shall be presumptive evidence that such firearm or ammunition was shipped or transported or received" in interstate or foreign commerce in violation of the act, is unconstitutional under the Fifth Amendment.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides: "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

Section 2 (f) of the Federal Firearms Act, 52 Stat. 1251 [U. S. C., Title 15, § 902 (f)], reads as follows: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

STATEMENT

On ———, 19—, FD was convicted in the United States District Court for the ——— District of Michigan upon a two-count indictment charging violations of section 2 (f) of the Federal Firearms Act [U. S. C., Title 15, § 902 (f)] (R. ———). The first count (R. ———) alleged that on ———, 19—, FD "was a person who had been previously convicted

of * * * robbery while armed" and that on the same day he did receive and possess a "Victor 38-caliber, double action * * * revolver, which firearms had theretofore been shipped and transported in interstate commerce" (R. —). The second count repeated the allegation of the previous conviction and alleged further that FD did receive and possess "two 38-caliber Peters cartridges and three R. W. S. 38-caliber cartridges, which had been theretofore shipped and transported in interstate commerce" (R. —). The court on — —, 19—, sentenced FD to five years' imprisonment on both counts, the sentences to run consecutively (R. —).

The agreed statement of facts may be summarized as follows:

Witnesses for the government testified that on — —, 19—, FD had in his possession in the city of —, Michigan, a Victor, .38-caliber revolver loaded with two .38-caliber Peters cartridges and three R. W. S. cartridges of the same caliber (R. —). It was also shown by the government that the pistol was manufactured in Massachusetts before 19— (R. —), and that the cartridges were manufactured in Ohio and Germany (R. —); the government introduced, however, no evidence to show that FD received, shipped, or transported either the gun or the cartridges in interstate commerce (R. —).

FD testified that he picked the pistol up in self-defense after it had been dropped by one of several persons attacking him (R. —). Witnesses for the government testified that they did not "see the revolver dropped by anyone and picked up by FD as he claimed" (R. —).

The Court of Appeals reversed the convictions on both counts on the ground that the presumption provided in section 2 (f) is unreasonable, arbitrary, and capricious, and therefore violative of the due process clause of the Fifth Amendment, in that there was no "rational connection" between the fact which must be proved to make the presumption operative and the ultimate fact inferable by virtue of the presumption.

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding that the presumption clause of section 2 (f) of the Federal Firearms Act [U. S. C., Title 15, § 902 (f)] is unconstitutional.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals that the presumption in section 2 (f) of the Federal Firearms Act [U. S. C., Title 15, § 902 (f)] violates the due process clause of the Fifth Amendment is in direct conflict with the decision of the Court of Appeals for the — Circuit in *FT v. United States*, decided — —, 19—, and now pending on petition for a writ of certiorari, No. —, — Term, 19—,

and with the decision of the Court of Appeals for the — Circuit in *JV v. United States*, decided — —, 19—. In our memorandum in the *FT Case* we have not opposed the granting of the petition in so far as it raises the constitutionality of the presumption provided in section 2 (f). The same question is presented in our petition for a writ of certiorari filed this day to review the judgment of the Court of Appeals in *WM v. United States*. The instant case and the *WM Case*, though tried separately, were decided by the court below in one opinion.

CONCLUSION

For the foregoing reason it is respectfully submitted that this petition for a writ of certiorari should be granted.

Solicitor General.

Date —.

Source of Form.

United States v. Delia, 319 U. S. 463, 87 L. ed. 1519, 63 Sup. Ct. 1241.

Note.

Armed robbery is a "crime of violence" for the purposes of the act, see 4 F. C. A., Title 15, § 901 (6); U. S. C. A., Title 15, § 901 (6); id. U. S. C.

780. Petition by Defendant for Certiorari in Supreme Court.

Supreme Court of the United States

— Term, 19—.

No. —.

TP, Petitioner,

v.

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, TP, in support of his petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the — Circuit, entered — —, 19—, affirming his conviction for alleged criminal contempt on — —, 19—, respectfully shows:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

This proceeding was initiated by an information by the United States on — —, 19—, in the — Division of the — District of Missouri

as cause No. — (R. —). The information charged (a) the pendency of certain insurance rate litigation whereunder interlocutory injunctions had issued restraining interference by Missouri officials with a promulgated rate increase by insurance companies, (b) the filing on — —, 19—, by such companies of a motion for decree in accordance with a stipulation of settlement, (c) the entry by the purported statutory court on — —, 19— of the decree as prayed, (d) that such settlement was corruptly procured by CS, representative of the insurance companies, by the payment of divers sums of money to petitioner TP and RO, then Missouri superintendent of insurance, a codefendant, AM, acting as intermediary, and (e) that TP, RO, and AM agreed to conceal such transactions which were eventually disclosed by AM in — —, 19— to a grand jury investigating income tax evasion on the part of TP. The proceeding came on for trial on — —, 19—.

THE INSURANCE RATE LITIGATION

It appears by stipulation that on — —, 19— certain insurance companies in Missouri promulgated a rate increase and so advised the Missouri superintendent of insurance (R. —). Before official action thereon in approval or disapproval, bills in equity were filed in the United States Court for the — Division of the — District of Missouri seeking injunctive relief against official interference with the rate increase in question (R. —). The superintendent thereupon refused to approve the increase. The bills in equity proceeded upon the theory that the action of the superintendent as to rates was arbitrary, unconscionable, and confiscatory (R. —). An interlocutory injunction issued upon the ground of the allegedly confiscatory character of the action of the superintendent (R. —), wherein official interference with the increased premium rates was restrained (R. —), upon the condition, however, that the entire amount representing such increase should be impounded (R. —) with a custodian appointed by the court (R. —). While the matter of the approval of the special master's report was pending before the court, the companies on — —, 19—, filed a motion for decree, reciting that the litigation had been compromised (R. —). On — —, 19— there was filed a stipulation of settlement in support of the motion for decree (R. —). The actual compromise was accomplished by an agreement of — —, 19—, and the motion and stipulation aforesaid were prepared pursuant thereto (R. —). On — —, 19— the court entered its decree dismissing the causes and directing the distribution of the impounded funds (R. —). The substantial effect of the compromise was the retroactive approval by the superintendent of four-fifths of the promulgated rate increase and the distribution of the impounded funds in accordance therewith.

The successor superintendent of insurance on — —, 19— filed a motion to cite the insurance companies to show cause why the decree

of ———, 19— should not be vacated or modified (R. ———). On the same day the court entered an order of restitution, directing that all funds paid out to the insurance companies under the decree of ———, 19— be restored to the custodian (R. ———). An order to show cause was also entered on the same date whereunder the insurance companies were directed thus to show cause why the restored funds should not instanter be distributed among the policyholders (R. ———). On ———, 19—, the court entered its decree directing the distribution among the policyholders of the funds theretofore, under the decree of ———, 19—, ordered paid to the insurance companies or their representatives (R. ———).

THE CONVICTION AND SUBSEQUENT PROCEEDINGS

Upon these facts the trial court filed its opinion on ———, 19— (R. ———), and judgment and sentence were pronounced on ———, 19— (R. ———).

Appeals were taken both to this court and to the Court of Appeals. *TP v. United States*, 314 U. S. 574, 86 L. Ed. —, 63 Sup. Ct. 268. Upon appeal, in the court below, petitioner contended: (1) That neither the acts charged nor proved constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice; (2) that prosecution was barred by laches and the statute of limitations; (3) that petitioner's conviction should be reversed and further proceedings stayed, for the reason that his prosecution is in violation of an agreement with the United States; (4) that the court below was without jurisdiction. These contentions were rejected (R. ——— et seq.). This petition is filed within thirty days next after final judgment on ———, 19—.

B

STATEMENT OF THE JURISDICTION OF THIS COURT

(1) STATUTORY PROVISION BELEIVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this court is invoked under sections 1254 and 2101 of Title 28 of the United States Code.

(2) THE DATE OF THE JUDGMENT TO BE REVIEWED.

The judgment of the Court of Appeals for the ——— Circuit affirming the conviction of petitioner was entered on ———, 19— (R. ———). This petition, with supporting brief, and the certified record, are filed within thirty days next after final judgment.

(3) STATEMENT OF THE NATURE OF THE CASE AND THE RULINGS OF THE COURT OF APPEALS BRINGING THE CASE WITHIN THE JURISDICTION OF THIS COURT.

The nature of the case (a prosecution for criminal contempt) has been heretofore stated. The Court of Appeals ruled: (1) That, although no act of petitioner occurred in the presence of the court or in any geo-

graphical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of § 401 of Title 18 of the United States Code, and hence was punishable upon information for contempt (R. —); (2) that this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. —); (3) that, although the prosecution of petitioner was in breach of his agreement with the United States, such agreement did not give rise to any equitable right to have the proceedings stayed pending application for executive clemency (R. —); (4) that the trial court was vested with jurisdiction (R. —). Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4) CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT.

This court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

C

THE QUESTIONS PRESENTED

(1) Did the conduct of petitioner constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of § 401 of Title 18 of the United States Code, and thereby render him punishable for contempt upon information?

(2) Was prosecution of petitioner under the information barred by laches and the statute of limitations in view of the admitted fact that any and all acts of alleged contempt (i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information?

(3) Should the conviction below be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States?

* * *

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In ruling (R. —) that the conduct of petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of § 401 of Title 18 of the United States Code, and thereby rendered him punish-

able for contempt upon information, although petitioner at no time was in the presence of the court or in geographical proximity thereto, no misbehavior there occurred, and no claimed misbehavior disrupted order or decorum or actually interrupted the court in the conduct of its business, the Court of Appeals (——, J., dissenting) has decided a federal question in a way probably in conflict with applicable decisions of this court, viz: [Here insert case names and officials]; and has rendered a decision in conflict with decisions of other Courts of Appeals on the same matter, viz: [Here insert case names and officials]. See further: [Here insert case names and officials].

(2) In ruling that the prosecution of petitioner under the information was not barred by the statute of limitations or laches, despite the admitted fact that all acts of alleged contempt (i. e., alleged misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information, and in further ruling that the appropriate statute of limitations (U. S. C., Title 18, § 3282) was inapplicable either by analogy or enactment, the Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this court, viz: **AB v. United States**, — U. S. —, — L. ed. —, — Sup. Ct. —; **United States v. CD**, — U. S. —, — L. ed. —, — Sup. Ct. —; **Ex Parte E**, — U. S. —, — L. ed. —, — Sup. Ct. —; or, if the ruling below is not in conflict with the foregoing decisions of this court, as petitioner contends, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. The ruling below is unmistakably in conflict with the doctrine of the **AB Case** as heretofore judicially construed (e. g., [here insert citations of cases]); hence if, contrary to the contention of petitioner, the ruling below is not literally in conflict with the **AB Case**, it presents an important question of federal law which should be settled by this court.

(3) In ruling that the conviction below should not be reversed or further proceedings stayed, by reason of the fact that the prosecution of petitioner under the information is in violation of his agreement with the United States, the Court of Appeals has decided a federal question in a way probably in conflict with an applicable decision of this court, viz: **United States v. FG**, — U. S. —, — L. ed. —, — Sup. Ct. —, declaring the rule that an agreement with the United States creates an equitable right to a stay of any proceedings violative of the agreement, pending application for executive clemency, which, in the instant case, the executive is empowered to grant (**Ex parte E**, — U. S. —, — L. ed. —, — Sup. Ct. —); or, if such ruling is not thus in conflict, as petitioner contends, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

* * *

CONCLUSION

Each of the questions presented is of grave public importance. Unless the majority ruling below is reviewed, the law relating to contempt, both as to the substance of the offense and the question of limitations, will be left in confusion. Prosecutions for contempt are increasing in number, and the conflicts with this court and between circuits are unmistakable. The effect of an agreement with the United States and the jurisdiction of a statutory court to entertain a criminal proceeding for contempt are equally questions of fundamental importance which in the public interest should be determined.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Court of Appeals for the ——— Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said United States Court of Appeals in the case numbered and entitled on its docket Nos. ——— and ———, criminal. TP, appellant v. United States of America, appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States, and that the judgment of said Court of Appeals be reversed by this court, and your petitioner prays that the certified copy of the record and proceedings of said United States Court of Appeals for the ——— Circuit, filed with this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the court may seem appropriate and in conformity with law.

TP, Petitioner.

Address.

Attorney for petitioner.

Address.

Source of Form.

Pendergast v. United States, 317 U. S. 412, 87 L. ed. 368, 63 Sup. Ct. 268.

Cross-Reference.

Petition for review on writ of certiorari, Rule 37(b).

Note of Advisory Committee to Rule 37 (b).

"This rule continues existing law except that it grants to the Supreme Court

or a justice thereof the authority to extend the time for filing a petition for a writ of certiorari for an additional 30 days."

781. Application to Supreme Court Justice for Bail Pending Certiorari.

In the Supreme Court of the United States

— Term, 19—

No. —

—, Petitioner

v.

The United States of America, Respondent

PETITION FOR BAIL

Comes now petitioner, —, by his attorneys —, —, and —, of — —, and respectfully shows

On — —, 19—, petitioner was convicted in the United States District Court for the District of Columbia, of a violation of § 809 of the District of Columbia Code denouncing the procuring of a miscarriage. He was sentenced to confinement at hard labor for from one year to eighteen months and to forfeit his right to practice medicine. Pending appeal, his application for bail was denied by the trial court and by the United States Court of Appeals for this district, and petitioner is now confined in the District Reformatory. On appeal, the United States Court of Appeals for the District of Columbia on — —, 19— affirmed the judgment below.

Petitioner respectfully shows that he has filed in this court on — —, 19—, a petition for a writ of certiorari asking this court to review the judgment below.

JURISDICTION

The power of this court to grant bail in a case wherein an application for a writ of certiorari has been docketed in this court in accordance with the rules, seems unquestioned. Bail has been granted by a justice of this court in *United States v. M.*, — Fed. (2d) —; *O v. United States*, — U. S. —, — L. ed. —, — Sup. Ct. —; *H v. P.*, 156 U. S. 277, — L. ed. —, — Sup. Ct. —.

While in *O v. United States*, supra, bail was granted after this court had granted certiorari there seems no distinction in principle between power to grant it after certiorari has been filed but not acted upon due to the summer recess and a case wherein this court has actually granted the writ. Rule 46 (2) of Rules for Criminal Procedure for United States District Courts (U. S. C., Title 18 following § 3772; 8A, F. C. A., c. 2), expressly provides for bail on appeal in a proper case. "Appeal" seems broad enough to cover a subsequent certiorari designed to review the appeal or complete the appellate process.

REASONS WHY BAIL SHOULD BE GRANTED IN THE PRESENT CASE

The attached petition for a writ of certiorari and brief in support thereof shows that the present case involves an important question relative to

the construction of a federal statute, wherein the decision of the court below is in conflict with decisions of the highest courts of various states in construing identical criminal statutes. The present case further involves an important question of evidence, i.e., whether the testimony of a doctor based partly on a physical examination and partly on hearsay, that a criminal abortion had been performed (the ultimate fact the jury was there to decide), was not so grossly erroneous and prejudicial as of itself to require a reversal. The case further involves the important question whether under the District of Columbia statute involved the burden of proof is not on the government to show that the use of the means to procure the miscarriage was not necessary to preserve the woman's life and whether a refusal of the court to instruct at all on this question, leaving the jury completely in the dark as to where the burden of proof lay, was not likewise highly prejudicial error. On this question too there is a conflict of decisions among the various states.

It should likewise be pointed out that the affirmance below was by a divided court, Mr. Justice ——— dissenting as to the meaning of the statute and also as to the prejudicial testimony of the doctor to the effect that an abortion had been performed based partly on what the woman told him.

CONCLUSION

It is respectfully submitted that an examination of the petition for a writ of certiorari herein shows on its face that important questions are raised in the present case. There is a strong likelihood that this court will grant certiorari: Petitioner has been confined since ———, 19—. If he is compelled to continue serving his sentence until the second week in ———, 19—, the earliest date this court can pass upon the petition for a writ of certiorari, he will, in the event that the court grants the writ, have been compelled to serve eight months of a sentence containing a minimum of one year's punishment. Under these circumstances it is submitted that the Honorable Justice to whom the present petition is addressed should grant the present application for bail if he feels that substantial questions are involved.

Respectfully submitted,

Petitioner.

We hereby certify that the petition for a writ of certiorari in the present case and the present petition for bail is filed in good faith and not for purposes of delay.

Attorneys for petitioner.

Address.

Service acknowledged this — day of —, 19—.

Attorney for respondent.

Address.

Source of Form.

Chrichton v. United States, 67 App.
D. C. 300, 92 Fed. (2d) 224.

Cross-Reference.

Application for relief pending review,
Rule 38(c).

782. Order of Supreme Court Justice Granting Bail.

In the Supreme Court of the United States

No. —, — Term, 19—

Petitioner,

v.

The United States of America

ORDER

Upon consideration of the application of the petitioner, —, for his release from custody on bail pending his appeal from the United States District Court for the — District of — to the United States Court of Appeals for the — Circuit.

It is ordered, that the petitioner, —, be released from custody and admitted to bail pending his appeal from the United States District Court for the Southern District of West Virginia to the United States Court of Appeals for the — Circuit and pending the final determination of his appeal by the United States Court of Appeals for the — Circuit. Provided, however, that the petitioner shall execute and file with the clerk of the Supreme Court of the United States a good and sufficient surety in the sum of — dollars (\$—) conditioned that he will fully and promptly abide by the decision of the United States Court of Appeals for the — Circuit. The said bond shall run to the United States of America and shall be subject to approval by the undersigned justice of the Supreme Court of the United States. When the said bond is so approved and is filed with the clerk of the Supreme Court of the United States, but not before, the petitioner, —, shall be enlarged on the bail so given.

Associate Justice of the Supreme
Court of the United States.

Dated this — day of —, 19—.

Bond in the sum of — dollars (\$—) conditioned in accordance with the terms of the above order and approved by the Honorable —, Associate

Justice of the Supreme Court of the United States, filed in the office of the clerk of the Supreme Court of the United States this ---- day of ----, 19--.

Clerk.

Source of Form.

Simon v. United States, 47 Am. Bankr.
(N. S.) 331, 123 Fed. (2d) 80.

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PART THREE—SPECIAL REMEDIES AND PROCEEDINGS

CHAPTER 23—HABEAS CORPUS

| Form | Form |
|--|--|
| 785A. Motion to vacate, set aside or correct sentence. | 801. Order denying writ of habeas corpus. |
| 799. Petition for habeas corpus in Selective Service case. | 802. Order discharging writ and remanding petitioner to custody of respondent. |
| 800. Traverse. | |

785A. Motion to Vacate, set Aside or Correct Sentence.

(Caption.)

Defendant moves this court for an order directing that the sentence imposed herein on the _____ day of _____, 19____, be vacated (set aside) (corrected) and that he be released from custody upon the following grounds:

1. The sentence was imposed in violation of the Constitution (or laws) of the United States in that _____.
2. The court was without jurisdiction to impose the sentence in that _____.
3. The sentence was in excess of the maximum authorized by law in that _____.

Attorney.

Address.

Note.

Title 28, U.S.C., enacted June 25, 1948, (Chap. 153), amended the law of Habeas Corpus in a number of important respects. Section 2255 permits a prisoner to attack his sentence or seek its correction by motion in the sentencing court at any time. Application for a

writ of habeas corpus may not be entertained on behalf of a prisoner who has failed to apply for relief by motion or who has been denied such relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

799. Petition for Habeas Corpus in Selective Service Case.

(Caption.)

Your petitioner respectfully alleges and shows:

1. That AB, the petitioner, makes application on her own behalf and on behalf of CD, for a writ of habeas corpus to inquire into the cause of detention of CD, her husband.
2. That the place where said CD is restrained of his liberty is Camp _____, _____. That the person or persons by whom he is so imprisoned or restrained is _____, the commanding officer at said camp.

3. That the said CD has not been committed and is not detained by virtue of a judgment, decree, final order, mandate, or process.

4. That the cause or pretense of the imprisonment and restraint of said CD according to the best knowledge and belief of petitioner is that he was a registrant under the Selective Service Draft Board No. —, located at —, —. That the registrant duly registered, and on —, —, 19—, was classified by the said local board in Class 1-A, and that thereafter he was given notice of selection and was inducted into service of the United States Army on or about —, —, 19—.

5. That the imprisonment and restraint of said CD, is illegal in that on the date of his classification, he was married and his wife was dependent upon him within the meaning of § 23, par. 354 of the Selective Service Regulations, and in that after his marriage on —, —, 19—, he gave notice as required by said regulations of a change of circumstances, and informed his local board that his wife was dependent upon his income, in accordance with the requirements of the regulations, which information is a part of the record and was before the local board on the date of the classification of the registrant in Class 1-A.

After receiving notice of classification, the registrant duly appealed to the appeal board in the proper district and on or about —, —, 19—, the said appeal board affirmed the classification of the local board.

6. The imprisonment and restraint of said CD is illegal in that he should have been entitled to a deferred classification in Class 3-A, and under such classification he would not be called for selective service for a considerable period of time, and the said selective service board acted in an arbitrary and capricious manner and contrary to law in classifying the registrant in Class 1-A, and refusing to reclassify him. Their decision was an abuse of the discretion committed to them by the statute, and the action of the said appeal board in affirming the classification of the local board was arbitrary and capricious and contrary to law.

7. That this application is made with the full knowledge and authority of the registrant who is now detained at Camp —, —, —.

8. That no previous application has been made for the writ sought herein, and that no appeal has been taken from any order, action, or proceeding against said CD, whereby he has been imprisoned or restrained of his liberty.

Wherefore, petitioner prays that a writ of habeas corpus directed to —, the Commanding Officer at Camp —, —, —, issue for the purpose of inquiring into the cause of the imprisonment and detention, and restraint of said CD, and of delivering him therefrom, pursuant to the statute in such case made and provided.

Date —.

AB,
Petitioner.

Address.

United States of America }
_____ District of _____ } ss:

AB, the above-named petitioner, being duly sworn, says that the contents of the foregoing petition are well known to her, and that the same is true to her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

Sworn to before me this _____ day of _____, 19—.

[SEAL]

Notary public.

800. Traverse.

(Caption.)

CD, the person restrained herein and by whose authority the petition herein was verified and filed, for a traverse to the return to the writ of habeas corpus herein respectively sets forth and alleges as follows:

1. Denies that said CD was lawfully selected for service in the United States Army and further denies that he has been duly and regularly inducted therein under the provisions of the Selective Training and Service Act of 1940 (U. S. C., Title 50, Appx. § 302 et seq., 11 F. C. A., Title 50, Appx. 5).

801. Order Denying Writ of Habeas Corpus.

(Caption.)

Now on this _____ day of _____, 19—, the above matter coming on upon the petition for the issuance of a writ of habeas corpus, it is considered, ordered and adjudged that said application for a writ of habeas corpus be, and same is, hereby denied and said petition dismissed.

United States district judge.

802. Order Discharging Writ and Remanding Petitioner to Custody of Respondent.

(Caption.)

The above matter coming on for hearing, it is considered, ordered and adjudged that said writ of habeas corpus be, and same is, hereby discharged and petitioner remanded to the custody of respondent.

This _____ day of _____, 19—.

United States district judge.

Wherefore, said CD respectfully prays that the writ of habeas corpus issued herein by this court be sustained.

CD.

Address.

Sworn to before me this ____ day of ____, 19__.

Notary public.

CHAPTER 24—BANKRUPTCY

Form

821A. Answer in reclamation proceeding.
896. Motion for extension of time to
file petition for review.

Form

897. Petition for review.

GENERAL ORDERS IN BANKRUPTCY

No. 1. Dockets.

The clerk shall keep a docket, in which the cases shall be entered and numbered in the order in which they are commenced. It shall contain a memorandum of the filing of the petition and of the action of the court thereon; of the reference of the case, if any reference is made, to the referee; of the transmission by the referee to the clerk of all bonds, orders and reports, and of the referee's certified record of the proceedings; and of all proceedings in the case except those duly entered on the referee's docket. The clerk's docket shall be arranged in a manner convenient for reference, and shall at all times be open to public inspection. If the proceeding is brought under section 75 or 77 [11:203, 205], or under Chapters IX, X, XI, XII, or XIII, of the Act [11:401 to 1086], the docket shall so indicate.

The referee, in all cases referred to him shall keep a docket of all proceedings before him substantially in the manner indicated by Form No. 70. Such docket shall at all times be open to public inspection. The original referee's docket or a certified copy thereof shall be transmitted to the clerk for preservation by him when the case is closed. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

No. 10. Indemnity for expenses.

Before incurring any expense in procuring the attendance of witnesses or in perpetuating testimony, the clerk, marshal, or referee may require, from the bankrupt, debtor, or other person in whose behalf the duty is to be performed, indemnity for such expense. Money ad-

vanced for this purpose by the bankrupt, debtor, or other person shall be repaid him out of the estate as part of the cost of administering the same. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

No. 24. List of proved claims and interests.

The person with whom proofs of claim or of interest are filed shall maintain open to inspection a list of the claims and interests proved against the estate, with the names and addresses of the owners thereof, as given by them. The list of claims or of interests shall be maintained substantially in the manner indicated by Form No. 71. The original list or a certified copy thereof shall be transmitted to the clerk for preservation by him when the case is closed. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

No. 26. Accounts of referee.

Every referee shall maintain, substantially in the manner indicated by Form No. 46, a cash book or a record in which he shall keep an accurate and itemized account showing (1) all moneys received by him in his official capacity as referee in bankruptcy and the case number of the proceeding to which each receipt is credited; and (2) the disposition made of such moneys, showing the case number of the proceeding, if any, on account of which each sum is disbursed. All moneys received as aforesaid shall be deposited forthwith to the credit of the referee in his official capacity in a depository designated by the court for the purpose, and shall be disbursed only

by checks signed by the referee in his official capacity. Within thirty days after the expiration of each six months' period ending June thirtieth and December thirty-first of each year, each referee shall submit to the district court a report substantially in the manner indicated by Form No. 47 containing (1) a financial statement showing all moneys received and disbursed in his official capacity as referee in bankruptcy during the period covered by the report; (2) an analysis of the unexpended balance in his official account at the end of the period; (3) a statement showing the number of cases handled during the period; and (4) a list of the proceedings referred to him which have remained open for more than eighteen months, giving the reasons in each instance why they have not been closed. The statements so submitted shall be in duplicate and verified; and one copy shall be transmitted by the clerk, forthwith upon its receipt, to the Administrative Office of the United States Courts. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

No. 35. Compensation of clerks, referees, receivers and trustees.

(1) * * *

(4) The petition in a voluntary proceeding under Chapter I to VII or Chapter XIII of the Act [11:1 to 112, 1001 to 1086] may be accepted for filing by the Clerk if accompanied by a verified petition of the bankrupt or debtor stating that the petitioner is without and can not obtain the money with which to pay the filing fees in full at the time of filing. Such petition shall state the facts showing the necessity for the payment of the filing fees in installments and shall set forth the terms upon which the petitioner proposes to pay the filing fees.

a. At the first meeting of creditors or any adjournment thereof, the court after hearing and examination of the bankrupt or debtor, shall enter an order fixing the amount and date of payment of such installments. The final installment shall be payable not more than six months after the date of filing of the original petition; provided, however, that for cause shown the court may extend the time of payment of any installment for a period not to exceed three months.

b. Upon the failure of a bankrupt or debtor to pay any installment as ordered, the court may dismiss the proceedings for failure to pay costs as provided in Section 59g of the Act [11:95, subsec.

g]. If a proceeding is dismissed or closed without the payment of the filing fees in full, the amount collected in installments, including any payment made at the time the original petition is filed, shall be divided between the clerk, the referees' salary fund, the referees' expense fund and the trustee, if any, in the same proportion as such filing fees would be distributed if paid in full.

c. No proceedings upon the discharge of a bankrupt or debtor shall be instituted until the filing fees are paid in full. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

No. 50. Proceedings under section 75 of the Act [11:203].

The following rules shall apply to proceedings under section 75 of the Act [11:203]:

(1) * * *

(12) The twenty-five dollar fees of the conciliation commissioner, and the fees and expenses of the supervisory conciliation commissioner, shall be payable out of appropriated funds in accordance with such instructions as may be issued from time to time by the Director of the Administrative Office of the United States Courts. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

No. 53. Bond of designated depository under section 61 [11:101].

(1) * * *

(2) The condition of bonds hereafter given shall be substantially to the effect that the banking institution, so designated, shall well and truly account for and pay over all moneys deposited with it as such depository, and shall pay out such moneys only as provided by the bankruptcy law and applicable general orders and court rules, and shall abide by all orders of the court in respect of such moneys, and shall otherwise faithfully perform all duties pertaining to it as such depository; provided, that no security in the form of a bond or otherwise shall be required in the case of such part of the deposits as are insured under section 12B of the Federal Reserve Act, as amended.

* * * (As amended by order of the Supreme Court dated June 3, 1940, which provided that the amendment should take effect immediately.)

No. 56. Rules by courts of bankruptcy.

Each court of bankruptcy, by action of a majority of the judges thereof, may

from time to time make and amend rules governing its practice in proceedings under the Act not inconsistent with the Act or with these general orders. Copies of rules and amendments so made by any court of bankruptcy shall, upon their promulgations, be furnished

to the Supreme Court of the United States and the Administrative Office of the United States Courts. (As amended by order of the Supreme Court dated June 23, 1947, which provided that the amendment take effect July 1, 1947.)

821. Petition in Reclamation Proceedings.

NOTES TO DECISIONS

Personal Property.

On petition for reclamation of personal property sold under conditional sales contract to debtor sold by trustee appointed by court after debtor filed its petition in bankruptcy, petitioner was not entitled

to recover interest from date payments became due, but was entitled to recover a reasonable attorney's fee. In re Golden Gate Turf Club (D. C.-Cal.), 48 Fed. Supp. 686.

821A. Answer in Reclamation Proceeding.

(Caption.)

John Doe, the receiver herein, answers the petition of AB, filed on ———, 19——, as follows:

1. He admits the allegations contained in paragraphs 1, 2, and 5 of the petition.
2. He alleges that he is without knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 3 and 4 of the petition.
3. He alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 6 of the petition that the petitioner is the sole owner of the property referred to therein. He admits the other allegations of said paragraph.

Wherefore, the receiver prays that the petition be dismissed with costs.

Attorney for receiver.

Address.

Source of Form.

Zydney v. New York Credit Men's Assn. (C. C. A. 2), 113 Fed. (2d) 986.

826. Appointment and Oath of Appraiser.

NOTES TO DECISIONS

Record.

Where the record contained no appointment or oath of any appraiser, the court

would conclude that no appraiser was appointed. Corey v. Blake (C. C. A. 9), 136 Fed. (2d) 162.

831. Notice of First Meeting of Creditors.

NOTES TO DECISIONS

Publication of Notice.

Publication of notice of first meeting of creditors only in local newspaper was not an abuse of discretion, although, in view of large number of individual

creditors presumably widely scattered, the referee might well upon his own initiative have made a more extensive publication. In re Credit Service, Inc. (D. C.-Md.), 45 Fed. Supp. 890.

896. Motion for Extension of Time to File Petition for Review.

(Caption.)

CD, having heretofore filed objections as a creditor, to the petition for discharge of the bankrupt, AB moves that the time to file a petition for review of the order of the referee granting the discharge, be extended until ———, 19—, on the following grounds: [Here insert].

Date ———.

United States district judge.**897. Petition for Review.**

(Caption.)

To ———, Esquire, Referee in Bankruptcy.

The petition of ——— respectfully shows:

1. The petitioner is the bankrupt (the trustee) (a creditor of the bankrupt) herein.
2. On ———, 19—, an order was made by the referee herein whereby [here insert]. A copy of said order is hereto annexed and marked "Exhibit A."
3. The said order is erroneous on the following grounds: [Here follows enumeration].

Wherefore, the petitioner prays that said order be reviewed, vacated, and set aside.

Date ———.

Petitioner.

Address.

Attorney.

Address.**CHAPTER 25—COURT OF CLAIMS OF UNITED STATES**

Form

909. Petition in special jurisdiction case.
910. Petition in Indian case.
911. Petition on congressional reference
of war claim.

Form

912. Petition on congressional reference.
913. Petition in action for taking of
property by eminent domain.
914. Petition in action for taking of
contract by eminent domain.

909. Petition in Special Jurisdiction Case.

In the Court of Claims of the United States

No. ———.

AB, Claimant

v.

United States of America, Defendant

PETITION

To the Court of Claims of the United States:

The petition of AB respectfully represents:

1. The petitioner is a citizen of the United States and is a resident of ———.
2. This petition is filed against the United States under and pursuant to the provisions of the Act of Congress approved ———, 19—, entitled "An act conferring jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of AB."
3. Heretofore and before ———, 19—, your petitioner was the true, individual, and sole owner of a steam, stern-wheel packet boat, "——" serving both passengers and cargo and duly licensed and enrolled at the port of ———, Pennsylvania, on the — day of ———, 19— (Official No. ———), having a length of — ft., breadth — ft., and a registered depth of — ft. and of — tons. That while the said steamboat "——" was proceeding up the ——— River, a navigable stream of the United States, on the said ———, 19—, the said steamboat struck a submerged wicket of United States Dam No. — on the ——— River and sank. Said Dam No. — in the ——— River was operated and maintained by the United States through the medium of the United States Army Engineers and that at the time of the accident, various wickets at the dam were let down by those in charge due to the ice flow. That one or more of the wickets were not lowered and were left standing, but submerged and out of sight of river traffic, particularly the officers and crew of the steamboat "——," that there was no warning or buoy of any kind to warn navigators as to the presence of the wicket or wickets left standing and submerged, that the red lights were out over the wickets indicating that all was clear for this boat to go over the wickets, that this boat struck aforementioned wicket and sank at or about ——— A.M. on the said day, and that in their trip up the river they passed by United States Government Lock No. — on the ——— River at or about — A.M. on ———, 19—, and were not warned by those in charge of Lock No. — on the ——— River, which is likewise operated and maintained by the United States government through the medium of the United States Army Engineers, of any danger at Lock —, nor that any of the wickets of the said Lock No. — had been left standing and state on information and belief, that the lockman in

Fe charge of said Lock No. —, one —, at the time the said vessel passed
89 the said lock and prior thereto, had not been notified or issued any
orders or instructions relative to the condition of the wickets standing
at Lock No. —.

di After the boat had struck the wicket the officers and crew thereof
re managed to navigate the boat, with the wicket in its hull, to the lock wall,
u where it sank.

D 4. The petitioner has never assigned or transferred this claim or any
part thereof, that he is a citizen of the United States, that there are no
prior owners of this claim, and that he has at all times borne true
allegiance to the government of the United States and has not in any way
voluntarily aided, abetted, or given encouragement to rebellion against the
8 said government, that no action upon this claim other than herein stated
has been had before congress and that claimant is and always has been
the sole and absolute owner of the claim here presented.

b 5. By reason of the facts and conditions as herein above set out, the
steamboat "—" and a majority of her cargo were lost and destroyed
without any fault on the part of this plaintiff, the agents, officers, or
crew of the said boat and that but for the failure of the lock tender at
b either or both United States Locks, Nos. — and — in the — River
to notify said boat, its officers, and crew of the said condition of the
wickets at Lock No. —, the resultant damage, injury, and loss would
not have occurred.

h 6. The petitioner's loss and damage as a result of the facts herein
above set out consisted of: (a) The total loss to him of his vessel, the
e steam stern-wheel packet boat, "—," and that the reasonable market
value of this boat immediately before the accident as herein set out on
— —, 19—, was — dollars (\$—), and that the reasonable market
a value of the boat immediately after the accident was — dollars (\$—),
I and that the difference in the market value immediately before and im-
mediately after the accident was — dollars (\$—), the amount of his
loss in the boat; (b) in addition to the loss of the boat, he suffered the
loss of the profits to be derived out of the operation of the boat, and
based on the profits from the operation of this said boat prior to the
accident and the operation of a similar boat of like capacity and per-
formance in the same territory immediately after the accident, the loss
of the use of the boat and the profits to be derived from the operation
thereof, amount to — dollars (\$—); (c) the loss of a majority of
her cargo or so much thereof as is of the value of — dollars (\$—),
and, (d) the sum of — dollars (\$—) as the cost of salvage of the
remaining cargo and attempts at salvage and raising of the boat, room
and board for the officers and crew, transportation, labor and materials,
and communication charges, or a gross total loss and damage of —
dollars (\$—) with interest at the legal rate of — per cent (—%)
per annum from the — day of —, 19—, until paid, which amount
your claimant hereby claims, and no part of which has been paid.

Wherefore, the claimant, AB, prays judgment against the defendant, United States of America, for the sum of — dollars (\$—).

Attorney for plaintiff.

STATE OF _____, }
COUNTY OF _____, } Sect. Affidavit

AB, petitioner herein states that the foregoing petition is true.

AB.

Subscribed and sworn to before me, by AB.

Notary public.

910. Petition in Indian Case.

In the Court of Claims of the United States

AB Tribe of Indians,

Plaintiff,

v.

The United States,

Defendant.

Petition filed — — —, 19—.

To the Honorable the Court of Claims,

The plaintiff, AB Tribe of Indians, respectfully represents:

1. The plaintiff is an organized Tribe of Indians, most of whose members live on — Indian Reservation, in the state of —.

2. This action is brought pursuant to an Act of Congress, approved on — — —, 19—, entitled “—” (— Stat. —), which provides in part as follows, and a copy of which is attached hereto, marked “Exhibit A,” and made a part hereof.

[Here quote salient portions of jurisdictional act authorizing bringing of suit.]

3. No action has been taken by the congress or any other agency of the United States with respect to the claim herein alleged except in connection with the enactment of the aforesaid act. The plaintiff has always been and now is the sole and absolute owner of said claim and no person other than the plaintiff has or has ever had any interest therein. No assignment or transfer of the said claim or of any part thereof or of any interest therein has been made. The plaintiff has not been paid the amount herein claimed or any part thereof, and is justly entitled to recover the amounts claimed from the United States after allowing all just credits and offsets. The plaintiff has at all times borne true allegiance to the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government.

4. At all times since ———, 19——, the defendant has been the guardian and trustee of all of the property of the plaintiff. Said property included during said period, ——— acres of forest land. In the year ———, the defendant, pursuant to law, built a lumber mill on said forest lands, with funds belonging to plaintiff, for the account and benefit of the plaintiff. In the year ———, the said lumber mill burned down, and in the year ———, the defendant pursuant to law built another lumber mill, with funds belonging to the plaintiff, on said forest lands for the account and benefit of the plaintiff. Said forest lands and said mills have been operated by the defendant to the present time as a timber and lumber business for the account and benefit of the plaintiff. The defendant, as guardian and trustee, has actively managed said property and business.

5. The defendant at all times since the creation of the following trust funds for the benefit of the plaintiff has been and now is the trustee of said funds among others: [Here follows enumeration of funds].

6. The defendant has been and is under an obligation to pay interest on the following of the aforesaid funds: [Here follows enumeration].

7. In making expenditures for the use and benefit of the plaintiff out of the aforesaid funds, the defendant was under an obligation to make such expenditures out of funds that did not bear interest in so far as possible, and thereafter out of funds bearing interest at a rate lower than that of other funds. In violation of the aforesaid duty, however, the defendant improperly, wrongfully, and unlawfully made numerous expenditures for the use and benefit of the plaintiff out of funds bearing interest at a high rate, while funds not bearing interest or bearing interest at a lower rate were available for such expenditures. By reason of the premises, the plaintiff sustained large losses and damages in interest on certain of said funds, the exact amount of said losses and damages being unknown to the plaintiff.

Wherefore, the plaintiff prays that the defendant make a full, true, and complete discovery and disclosure of the facts, matters, and transactions herein alleged, and render a complete accounting therefor, that the defendant be adjudged liable to the plaintiff for the losses and damages above referred to, as may be found due upon an accounting, that plaintiff recover judgment against the defendant for the sum so found to be due, and that plaintiff have such other and further relief as to the court may seem just.

Attorneys for plaintiff.

Address.

STATE OF _____ }
COUNTY OF _____ } ss.

CD, being duly sworn, deposes and says: He is a member of the firm of D & F, attorneys for the plaintiff in this action, that by contract dated

_____, 19____, approved by the Commissioner of Indian Affairs on _____, 19____, and by the Secretary of the Interior on _____, 19____, entered into between the plaintiff and D & F, said D & F were retained and engaged to institute and prosecute any and all claims of the plaintiff against the United States, that this action is brought pursuant to the authority conferred on D & F by said contract, that the deponent has read the foregoing petition and that the statements contained therein are true to the best of his knowledge, information, and belief.

_____ CD.

Address.

Subscribed and sworn to before me this _____ day of _____, 19____, at _____.

Notary public.

Note.

Menominee Tribe of Indians v. United States, 95 Ct. Cls. 232.

911. Petition on Congressional Reference of War Claim.

In the Court of Claims of the United States

Congressional No. _____

_____ Manufacturing Company

v.

United States of America, Defendant.

PETITION

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioner, the _____ Manufacturing Company, respectfully states and represents as follows:

I

That on March 3, 1923, the Senate of the United States passed a resolution (Senate Resolution 448) providing that Senate Bill _____ entitled "A bill for the relief of Rose City Cotton Oil Mill and others," pending in the senate, should be referred to the Court of Claims in pursuance of an act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911. A copy of said resolution is hereto attached as "Exhibit 1." The Senate Bill _____ referred to in said resolution authorized and directed the Secretary of the Treasury to pay certain specific sums of money to various persons, firms, or corporations owning and operating cotton-seed oil mills producing linters and having

contracts with the United States and which had been canceled. Your petitioner is one of the corporations named in said bill, a copy of which is hereto attached as "Exhibit 2."

II

That this petitioner is now, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the state of Georgia, and is a citizen of said state, having its principal office for the transaction of business in the city of —, county of —, and state of Georgia, that it has at all times borne true allegiance to the government of the United States and is the sole owner of the claim herein presented, no part thereof having been assigned or transferred to any person, firm, or corporation.

III

That this petitioner is now and was at all times hereinafter stated engaged in the cotton-seed crushing industry, which involves the production of cotton linters, cotton-seed oil, cotton-seed meal, cotton-seed hulls, and hull fiber. As a preliminary to the crushing of cotton seed for the production of oil, meal, and other products, it is and was during the times hereinafter stated engaged in cutting off from the cotton seed the short fiber that adhered thereto after the removal of the staple cotton by the first ginning process. This short fiber is called "linters" or "cotton linters," and will hereafter be referred to as such.

That prior to May 2, 1918, it was the general custom in the entire cotton-seed crushing industry to cut an average of 75 pounds or less of such linters from each ton of seed, which linters were sold and used in stuffing mattresses, pads, horse collars, and other articles, and in making celluloid, felts, absorbent cotton, and other products, except that after the outbreak of the World War in 1914, some of the mills in the industry, finding that there was a market for linters of more than 75 pounds per ton of seed, produced such cut and sold it for munition purposes.

That prior to such date there was a ready demand and market for linters of the cut of 75 pounds or less to a ton of seed, and this petitioner was able to dispose of all linters of such type that it cut.

IV

That on or about the 6th day of April, 1917, the Congress of the United States of America, by a joint resolution thereof, declared that a state of war existed between "the United States and the Imperial German Government," and on or about the 7th day of December, 1917, the said congress by joint resolution thereof declared that a state of war existed between "the United States of America and the Imperial and Royal Austro-Hungarian Government."

V

That on or about March 4, 1918, the President of the United States, in the exercise of his war powers pursuant to various acts of congress, reorganized the War Industries Board, with certain powers formerly exercised by the predecessor War Industries Board which had been created by the Council of National Defense on or about July 28, 1917, by virtue of an Act of Congress passed on or about August 22, 1916 (39 Stat. 649 (U. S. C., Title 50, § 1 et seq.)); that the powers and duties of said War Industries Board so reorganized by the President were stated in a communication addressed to Mr. BB on or about March 4, 1918, at which time the President tendered Mr. BB the chairmanship of said board, which communication is in words and figures as follows:

"The White House,

"Washington, March 4, 1918.

"MY DEAR MR. BB:

"I am writing to ask if you will not accept appointment as chairman of the War Industries Board, and I am going to take the liberty at the same time of outlining the functions, the constitution, and action of the board as I think they should be now established.

"The functions of the board should be:

"(1) The creation of new facilities and the disclosing, if necessary the opening up, of new or additional sources of supply.

"(2) The conversion of existing facilities, where necessary, to new uses.

"(3) The studious conservation of resources and facilities by scientific, commercial, and industrial economies.

"(4) Advice to the several purchasing agencies of the Government with regard to the prices to be paid.

"(5) The determination, wherever necessary, of priorities of production and of delivery and of the proportions of any given article to be made immediately accessible to the several purchasing agencies when the supply of that article is insufficient, either temporarily or permanently.

"(6) The making of purchases for the allies.

"The board should be constituted as at present and should retain, as far as necessary and so far as consistent with the character and purposes of the reorganization, its present advisory agencies; but the ultimate decision of all questions except the determination of prices, should rest always with the chairman, the other members acting in a co-operative and advisory capacity. The further organization of advice I will indicate below.

"In the determination of priorities of production, when it is not possible to have the full supply of any article that is needed produced at once, the chairman should be assisted and, so far as practicable, guided by the present priorities organization or its equivalent.

"In the determination of priorities of delivery, when they must be determined, he should be assisted, when necessary, in addition to the

present advisory priorities organization, by the advice and co-operation of a committee constituted for the purpose and consisting of official representatives of the Food Administration, the Fuel Administration, the Railway Administration, the Shipping Board, and the War Trade Board, in order that when a priority of delivery has been determined there may be common, consistent, and concerted action to carry it into effect.

"In the determination of prices the chairman should be governed by the advice of a committee consisting, besides himself, of the members of the board immediately charged with the study of raw materials and of manufactured products, of the labor member of the board, of the chairman of the Federal Trade Commission, the chairman of the Tariff Commission, and the Fuel Administrator.

"The chairman should be constantly and systematically informed of all contracts, purchases, and deliveries in order that he may always have before him schematized analysis of the progress of business in the several supply divisions of the Government in all departments.

"The duties of the chairman are:

"(1) To act for the joint and several benefit of all the supply departments of the Government.

"(2) To let alone what is being successfully done and interfere as little as possible with the present normal processes of purchase and delivery in the several departments.

"(3) To guide and assist wherever the need for guidance or assistance may be revealed; for example, in the allocation of contracts, in obtaining access to materials in any way preempted, or in the disclosure of sources of supply.

"(4) To determine what is to be done when there is any competitive or other conflict of interest between departments in the matter of supplies; for example, when there is not a sufficient immediate supply for all and there must be a decision as to priority of need or delivery, or when there is competition for the same source of manufacture or supply, or when contracts have not been placed in such a way as to get advantage of the full productive capacity of the country.

"(5) To see that contracts and deliveries are followed up where such assistance as is indicated under (3) and (4) above has proved to be necessary.

"(6) To anticipate the prospective needs of the several supply departments of the Government and their feasible adjustment to the industry of the country as far in advance as possible, in order that as definite an outlook and opportunity for planning as possible may be afforded the business men of the country.

"In brief, he should act as the general eye of all supply departments in the field of industry.

"Cordially and sincerely yours,

"WOODROW WILSON.

"Mr. BB,

"WASHINGTON, D. C."

That the said BB accepted said appointment as chairman of said War Industries Board and continued to perform the functions and duties set forth in said letter until said board ceased to function and was disbanded.

VI

That on or about August 10, 1917, the Congress of the United States passed what is generally known as the "Food and Fuel Control Act" (Public Act No. 41, 56th Congress); that in pursuance of said act, which authorized the President to issue any regulations or orders necessary to carry out its provisions, the President did on or about August 10, 1917, issue an executive order or proclamation providing for the organization of the United States Food Administration, a copy of which executive order or proclamation is hereto attached as "Exhibit 3" and made a part hereof, that in pursuance of said act and exercising the power therein given, the President issued various other executive orders or proclamations from time to time to bring under license control dealers in those commodities which he and the food administration deemed necessary to regulate, and proclaiming and declaring that dealers in certain foodstuffs specified must secure a license from the food administration before doing further business, that on or about October 8, 1917, the President in pursuance of said act issued an executive order or proclamation, licensing manufacturers, distributors, and dealers in staple food commodities and requiring that said manufacturers, distributors, and dealers should secure a license in order to continue the transaction of said business, that the manufacturers, distributors, and dealers in cotton-seed and the products manufactured therefrom were required by said proclamation or executive order to secure said license, and that cotton-seed and the products manufactured therefrom were thereby brought under the license control of the food administration. A copy of said executive order or proclamation is hereto attached as "Exhibit 4" and made a part hereof.

VII

That by virtue of said act of congress and the said executive orders and proclamations, the said food administration prescribed the conditions under which manufacturers, distributors, and dealers of cotton-seed and the products manufactured therefrom might operate, and that by its power to grant or withdraw licenses at discretion the said food administration thereupon took control of the cotton-seed industry of the entire country, that the said food administrator decided that the importance of oils of all sorts in the war program and the acute demand for cotton-seed cake made necessary some immediate action towards stabilization of prices, and accordingly by the presidential proclamation above referred to the ginnerers, crushers, refiners, and dealers in cotton-seed, cotton-seed oil,

cotton-seed meal and cake were placed under license on November 1, 1917, and continued to operate their business thereafter under license until said regulation was rescinded, that in compliance with said act, executive orders, proclamations, and regulations, your petitioner was given a license as a manufacturer, producer, distributor, and dealer of cotton-seed and its products, which said license was No. —, and continued to operate as a licensee under such license until said executive order, proclamation, and regulation were rescinded. The said license provided that the same should be revoked in the event of the failure of the licensee to comply with any of the provisions of the Food Control Act, or any of the orders, decisions, or regulations of the United States Food Administration.

VIII

That after the American entrance into the war the requirements for munition purposes made a further increased demand for linters, that in the spring of 1918 it became apparent to the government of the United States in the then existing state of war that the munition needs of the government and its allies and associates in the war were absolutely dependent upon increased production of munition linters during the crushing season beginning August 1, 1918, and ending July 31, 1919. Thereupon, on or about April 4, 1918, the War Industries Board formed a special division to deal with the subject, known as the "Cotton and Cotton Linter Section," with GJ as its chief. The said Cotton Linter Section thereupon made an investigation of the cotton-linter situation, and after a survey of the entire field found that the prospective production would be inadequate to meet the demands of the war program. The said Cotton Linter Section reported that the average annual production of linters in the five years preceding 1918 was less than one-half the prospective requirements for the year ending July 31, 1919, and reached the conclusion that it was not only necessary to increase the production of cotton linters but to limit the production to linters of munition type.

IX

By virtue of the act creating the Council of National Defense and by virtue of the action of the Council of National Defense creating the War Industries Board and by virtue of the act of the President reorganizing said board, the said War Industries Board thereupon took control and thereafter throughout its existence continued to regulate all industry in its direct and indirect relation to the war and to the nation. It thereupon organized various subboards and sections for the purpose of performing its functions, and especially for procuring an adequate flow of materials for the two great war-waging agencies of the government, to wit, the war and navy departments. It promulgated various rules and regulations controlling supplies necessary to the military needs of the government and its allies and associates in the war. It passed rules and regulations designed

to stimulate and expand production in those industries making war essentials and to regulate, through various plans and devices, preference lists, priorities, and other methods, all industries furnishing war needs. Among the industries so regulated was that engaged in crushing cotton-seed.

X

The President of the United States at the time of the reorganization of said War Industries Board appointed a price-fixing committee, made up of a chairman, a representative of the war department, a representative of the navy department, a representative of the fuel administration, a representative of the tariff commission, a representative of the federal trade commission, the labor representative of the War Industries Board, and the chairman of the War Industries Board, ex officio. The said price-fixing committee was organized on or about March 14, 1918, and thereafter, under the President's authority, assumed direct responsibility to the President and made its reports to him. Said committee advised upon the prices of basic materials, as to general price policies, and fixed prices subject to the approval of the President.

XI

That the manufacturers, distributors, and dealers in cotton linters were thereafter under the control, authority, and direction of the said War Industries Board and the said price-fixing committee until said board and committee ceased to function.

XII

That on or about April 12, 1918, the said Cotton Linter Section of the War Industries Board called a meeting of the representatives of the cotton-seed-crushing industry with representatives of the war and navy departments for the purpose of dealing with the acute situation which had been found to exist with reference to the production of cotton linters. Said meeting was held at Washington, D. C., on or about the 1st day of May, 1918, and was attended by officials of the War Industries Board, officials of the United States Ordnance Department, and by persons representing the cotton-seed crushers.

XIII

That at said meeting the cotton-seed crushers were advised of the war necessities of the government, its allies and associates, and they were also advised that the War Industries Board had decided that all cotton linters must thereafter be cut of the munition type, and that all such linters must be sold to the United States through the Du Pont American Industries, Inc., and to no other person, firm, or corporation. They were also advised that the United States would purchase all munition linters which the producers then had on hand, and all that were to be produced

thereafter during the remainder of the 1917-1918 season, and that the United States would purchase all munition linters produced during the season beginning August 1, 1918, and ending July 31, 1919, and that the price which would be paid for such linters would be \$.0467 per pound.

That since September, 1915, the price of linters had been at all times more than \$.05 per pound, and at the close of the year 1916 the average price was \$.068 per pound, and on May 1, 1919, the price was considerably higher.

The crushers who attended said meeting, upon being advised of the action taken by the officials of the United States, as above set out, agreed for themselves to the conditions so imposed, and further agreed to report said action to the industry and recommend its acceptance.

XIV

That on or about May 2, 1918, the War Industries Board notified this petitioner, as well as the other cotton-seed crushers, of its action in words and figures, as follows:

"The price-fixing committee of the War Industries Board has this day determined upon a price of \$4.67 per hundred pounds f.o.b. points of production on all cotton linters now in the hands of the producers (cotton-seed-oil mills), dealers in linters, warehousemen, or others than those manufacturing explosives or explosive materials, and also to apply for the linters to be produced during the next season, August 1, 1918 to July 31, 1919."

And also formulated and issued from time to time certain rules governing the manufacture of cotton linters, a copy of which rules is hereto attached as "Exhibit 5" and made a part hereof.

That after receiving the notification of the War Industries Board, relying upon the representation of the said officials of the United States, and believing that the United States would take all munition linters produced subsequent to May 2, 1918, up to and including July 31, 1919, the cotton oil mills began the rehabilitation of their plants, installed new machinery and equipment for the production of linters of munition type, and made provisions for storing and handling the same.

XV

That said petitioner subsequent to said May 2, 1918, cut all cotton linters of munition type, which it sold only through the Du Pont American Industries, Inc., which acted as the purchasing agent of the Procurement Division of the United States Ordnance Department, and said petitioner fully performed all obligations on its part to be performed with respect to said agreement of May 1, 1918, until ordered to cease and desist therefrom by the United States, acting through its agents, as more particularly hereinafter set forth.

XVI

That on or about May 20, 1918, Congress passed what is known as the "Overman Act," being an act authorizing the President to coordinate and consolidate various executive bureaus, agencies, and offices.

XVII

That in pursuance of said act and by virtue thereof, the President on or about May 28, 1918, issued an executive order or proclamation establishing the War Industries Board as a separate administrative agency, which proclamation is in words and figures as follows:

"I hereby establish the War Industries Board as a separate administrative agency to act for me and under my direction; this is the board which was originally formed by and subsidiary to, the Council of National Defense under the provisions of an act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes, approved August 29, 1916.

"The functions, duties, and powers of the War Industries Board, as outlined in my letter of March 4, 1918, to Bernard M. Baruch, Esquire, its chairman, shall be and hereby are continued in full force and effect.

“(Signed)

WOODROW WILSON.”

XVIII

That on or about August 1, 1918, for the purpose of carrying into effect the foregoing plans of the United States, a cotton linter pool was formed, for the purpose of taking all linters in the hands of the crushers as at May 1, 1918, and for the further purpose of purchasing, inspecting, and distributing all cotton linters to be produced during the entire crushing season, beginning August 1, 1918, and ending July 31, 1919.

The ordnance department, through which the other agencies of the government, including the navy, were to receive their supply of cotton linters, and the various departments or boards of the other governments who were allies and associates of the United States in the war, were members of the pool. As a part of the plan for the organization of the pool, the Du Pont American Industries, Inc., was appointed sole purchasing agent for the ordnance department, and a set of rules was formulated and adopted for the operation of the pool covering the detailed arrangement by which the participating members were to secure their supplies at uniform prices, including freight charges. In order that there should be no duplication of effort, the respective functions of the ordnance department and the Cotton Linter Section, with respect to the pool, were defined. Through the instrumentality of the pool, the cotton linters of the country were turned directly to war use, and the cotton-seed crushers were called upon, were compelled to, and did, obey the directions and instructions of the ordnance department and the Cotton Linter Sec-

tion with respect to the production of linters, their allocation, storage, shipments, and all other requirements imposed by such authorities.

XIX

That subsequent to May 1, 1918, and after the formation of the cotton linter pool, the United States Ordnance Department and the Du Pont American Industries, Inc., concluded to put into a written agreement the outstanding informal agreement and contract under which the Du Pont American Industries, Inc., was then acting as the exclusive purchasing agent for the cotton linter pool, and thereafter, on or about the 28th day of August, 1918, such written contract was made, whereby the Du Pont American Industries, Inc., was appointed the sole agent of the United States Ordnance Department to purchase all the cotton linters produced in the United States between the first day of August, 1918, and the first day of August, 1919, with full power to make contracts for such purchases either in the name of the government or in its own corporate name as agent for the government, that by the terms of said agreement the said agent was directed to pay the price of \$4.67 per hundred pounds, which had been fixed by the price-fixing committee heretofore referred to and which price had become effective on May 2, 1918. A copy of said contract is hereto attached as "Exhibit 6" and made a part hereof.

XX

That on or about the 2nd day of September, 1918, Du Pont American Industries, Inc., acting as a government agent and exercising the powers and duties conferred upon it by the contract hereinabove last referred to, sent to this petitioner and to all other producers engaged in the cotton-seed crushing industry a printed form of contract, with directions to this petitioner to execute the same, that by the terms of said printed contract so sent to this petitioner the United States of America, acting by Du Pont American Industries, Inc., agreed to purchase from this petitioner 200 bales of cotton linters, being approximately 100,000 pounds, at a price of 4.67 cents per pound, being the price fixed by the War Industries Board May 2, 1918. The said contract contained provisions as to the kind of material purchased, as to inspection, shipping instructions, and other details, and was identical with other contracts sent at the same time to all other cotton-seed crushers, excepting as to the amount of linters, place of delivery, time of shipment, and other details, that the quantity of linters stated in said contract was estimated to be all the cotton linters which would be produced by the petitioner during the crushing season beginning August 1, 1918, and ending July 31, 1919, and that the amounts stated under the caption, "time of shipment," were the amounts which were to be shipped during monthly periods extending over the entire crushing season. A copy of said contract is hereto attached as "Exhibit 7"

XXI

That when the said printed form of contract was presented to the Cotton Seed Crushers' Association for signature, objection was made to it on the ground that it contained a cancelation clause, providing that it could be canceled upon the "termination of the present war." But this petitioner, however, signed the contract with the cancelation clause therein, relying upon the agreement of the government of the United States to take the entire output of cotton linters for the season 1918-1919, which was embodied in the printed agreement. After the signing of said printed agreement, this petitioner continued to produce cotton linters under the terms of said agreement, and this petitioner faithfully performed all the obligations in the said agreement on its part to be performed and as therein provided, and continued to cut linters as directed by the War Industries Board and the ordnance department and to follow the rules and directions of the ordnance department and the Cotton Linter Section of the War Industries Board until ordered to cease and desist as hereinafter more fully set forth.

XXII

That this petitioner and all other cotton-seed crushers during the period during which they were performing said contract operated under licenses from the said food administration and were compelled to conduct their operations according to the rules and provisions of said food administration, that on or about July 1, 1918, the said food administration put into effect a system or scheme known as the stabilized scheme of prices for cotton-seed and its products, and fixed a price which the cotton-seed crushers were to pay for cotton-seed at \$70.00 per ton based on a production of 41 gallons of crude cotton-seed oil to be produced from each ton of seed crushed, that in fixing or adopting said scheme the said food administration divided the cotton-producing territory into zones and determined the yields and prices that should be effective for the seed-crushing season of 1918-1919.

That this petitioner and the other cotton-seed crushers were compelled to pay the prices therein set forth as a condition of remaining in business and keeping their licenses, that the food administration on or about September 7, 1918, promulgated an order or regulation addressed to all the crushers of cotton-seed and the purchasers of products thereof, further fixing the selling price of the products derived by crushing and establishing a stabilized price scale for the purchase and sale of cotton-seed and its products, and fixing the spread and profit which the cotton-seed crushers were to receive. A copy of said order and regulation, which is known as Circular No. 49, is hereto attached as "Exhibit 8" and made a part hereof. The schedule of prices, therefore, so adopted and fixed by the United States through its war agencies and affecting the purchase of cotton-seed and the crushing of the same and the disposition of the

products thereof for every ton of seed crushed during the season 1918-19, is as follows:

| | | |
|---|---------|---------|
| Crusher to pay farmer..... | \$70.00 | |
| Freight | 2.00 | |
| Cost of crushing operations (Spread)..... | 15.50 | |
| Profit | 3.00 | |
| Sale price of oil | \$53.80 | |
| Sale price of meal | 26.38 | |
| Sale price of hulls | 3.55 | |
| Sale price of linters (to be bought by Government)..... | 6.77 | |
| | <hr/> | |
| | \$90.50 | \$90.50 |

This petitioner, therefore, and all others engaged in the cotton-seed crushing industry continued to perform their agreement with the United States, while at the same time they were compelled to purchase the cotton-seed and sell the products thereof at the prices fixed by the United States through its various agencies. Although the price of all materials and labor had greatly increased, due to war activities, this petitioner was allowed, in said schedule and under the regulations of the food administration and the War Industries Board, a limited operating cost within the limits fixed by the rules and regulations above referred to irrespective of the actual cost, and under said rules it was allowed a gross profit upon a ton of cotton-seed from all the products combined of only \$3.00 per ton of seed crushed.

XXIII

That the United States thereupon, through its various agencies above set forth and various representatives located in different states and through special emissaries, sent to the cotton-producing territory, by letters, advertisements, speeches, and other propaganda, urged the cotton producers throughout the entire country to make unusual efforts to produce a large amount of cotton during the season 1918-1919, assuring them that a stabilized price had been fixed by the government of the United States and that the farmers and others would receive \$70.00 per ton based on the oil content of the seed produced, and the cotton-seed crushers in the entire industry, relying upon their agreements with the United States and relying upon the stabilization scheme which had been fixed, made commitments in their various localities, and obligated themselves to take all the seed that would be produced during said season at said fixed price of \$70.00 per ton. Because of the agreements made by the United States with the cotton-seed crushers and because of the stabilization scheme, cotton-seed became a staple commodity, upon which loans could be secured from the banks, and many banking institutions, throughout the cotton-producing territory, relying upon the good faith of the government, the stabilization scheme and the specific agreement of the United States,

made with the cotton-seed crushers, loaned large sums of money in order to encourage a maximum production of cotton. Mercantile and manufacturing industries likewise extended large credits based upon the good faith of such agreements and war program. Manufacturing, mercantile, and banking institutions loaned large sums of money and extended large credits to the cotton-seed oil mills, upon being shown the agreements with the United States and evidence of the possession of great quantities of such commodity, which had been made staple by the actions of the government.

XXIV

That pursuant to said agreement which this petitioner had with the government of the United States through the agencies above set forth, and acting upon the orders of the various departments of the government above referred to, this petitioner continued to crush seed and to produce linters therefrom as in said contract provided and in full compliance with the instructions of said governmental departments and in compliance with the said agreements and understandings above set forth, paying for the cotton-seed at the rate of \$70.00 per ton as fixed by the rules and provisions of the food administration and selling the products therefrom at the rates also fixed by the rules of the departments, and in good faith made commitments for the entire crushing season, having equipped their mills to take care of the entire requirements of the government, and continued to fully perform all the obligations on its part to be performed during the whole period from August 1, 1918, to July 31, 1919, inclusive, except as they were precluded from so doing by the orders, instructions, and requirements of the United States.

XXV

That on or about the 11th day of November, 1918, an armistice was duly signed between the United States and its allies, on the one hand, and the Imperial German Government and its allies, on the other hand, whereby hostilities were suspended. Said armistice was a truce between the nations at war, and was not a "termination of the present war," but was an agreement for suspending military operations by mutual agreement of the belligerents pending negotiations for the purpose of concluding a treaty of peace. The war still continued for several months after the signing of said armistice, during which time the armed forces of the United States were in enemy territory, military operations were continued, and the signing of said armistice in nowise prevented the resumption of hostilities between the belligerents in case a treaty of peace was not agreed upon.

XXVI

That on or about the 28th day of November, 1918, the War Industries Board, acting in conjunction with and for the benefit of the ordnance

department, notified all engaged in the cotton-seed crushing industry, including this petitioner, to change their cut of linters to the commercial grade, that said War Industries Board delivered a letter to LG, Secretary of the War Service Committee of the Interstate Cotton-seed Crushers Association, who was acting as the Washington representative of this petitioner and all other cotton-seed crushers, which said letter is in words and figures as follows:

"You are requested to notify all of your cotton-seed oil mills to discontinue the cutting of munition linters and to reduce the cut to 75 pounds or less at the earliest possible moment. When reduction in cut is begun an accurate record of seed crushed and linters produced should be made and preserved pending definite and final arrangement for the discharging of all obligations of the Government linter pool to the mills and the removal of all rules and restrictions now in force. This request is made to avoid as much as possible an obvious economic waste, and is at the suggestion of officials of the Ordnance Department. It is hoped that a prompt and definite plan for the settlement can be offered in a few days.

"(Signed)

GEORGE R. JAMES,

"Chief, Cotton and Cotton Linters Section."

Thereupon, the said LG immediately notified this petitioner and all other mills engaged in the cotton-seed crushing industry, of the direction so given by the War Industries Board.

XXVII

That subsequent to the mills receiving notification as above set forth, the crushers organized a committee to deal with the situation, which committee was known as the "Linter Committee" and will hereafter be referred to as such, that said committee, being in doubt as to what "definite and final arrangements for discharging all obligations of the government" were to be made, and what changes were to be made in the rules and restrictions governing said industry then in force, went to the city of Washington, and had numerous conferences with the War Industries Board, the ordnance department, and the food administration with reference to the situation. In the numerous discussions and negotiations held between the Linter Committee and the officials of the ordnance department, the government officials took the position that there was "a termination of the present war." Various propositions were submitted by the officials of the government to the Linter Committee and by the Linter Committee to the officials of the United States. On or about the 10th day of December, 1918, the said Linter Committee submitted a final proposition for the United States discharging all obligations under its agreement with the cotton-seed crushers upon the basis of the government agreeing to take all linters produced to December 21, 1918, at the

fixed price of \$4.67 per hundredweight f. o. b. mills point of production, the mills to change their linter production not later than said date to types known as mattress linters, which were to be sold at a price to be fixed by the War Industries Board, and to produce to the mills \$6.77 per ton of seed crushed, (which was the amount guaranteed the mills for their linter output for the entire season by the War Industries Board and the amount figured in the seed prices paid and to be paid the farmers under the food administration's plan of stabilization,) and providing that the government linter pool should be obligated to buy at the end of the season, July 31, 1919, all stocks of linters in the hands of the original producers according to the agreed-upon grades and at prices that would compensate the mills for any loss below the fixed \$6.77 per ton of seed. A copy of said proposition is hereto attached as "Exhibit 9." Said proposition was approved by Mr. GJ, the chief of the Cotton Linter Section of the War Industries Board, as being eminently fair, and after a conference of the committee representing the producers with Mr. BB, the chairman of the board, he likewise gave the proposition his full endorsement. The proposition was then submitted to the officials of the food administration, who likewise gave it their sanction and approval. The proposition thus became the joint recommendation of the mills, the War Industries Board, the food administration, and as such was submitted to the ordnance department. Attached hereto as "Exhibit 10" and made a part hereof is a copy of the letter of approval transmitted by the War Industries Board to the ordnance department, which rejected such proposal.

XXVIII

That on or about the 21st day of December, 1918, the War Industries Board ceased to function and was disbanded. A few days prior thereto, the Linter Committee had been notified that the War Industries Board would no longer function after said date and that all negotiations for the settlement of the obligations of the government must in the future be carried on with the United States Ordnance Department. Other negotiations and conferences were undertaken by and between the Linter Committee and the officials of the ordnance department, with the final result that on or about the 30th day of December, 1918, the Linter Committee, together with numerous others interested in the cotton-seed-crushing industry, assembled at Washington. On said date the ordnance department made a final proposition, to the effect that the United States would take all munition linters which had been cut prior to December 31, 1918, and then in the hands of the crushers, at the price stated in the printed agreement, which would net the crushers \$6.77 per ton of seed crushed, that the cotton-seed crushers after January 1, 1919, would cut no munition linters and would cut only commercial linters which they were permitted to sell to other purchasers, that the United States would take from the crushers whatever linters remained on hand and unsold

on July 31, 1919, provided the total quantity did not exceed 150,000 bales, at prices estimated to net the crushers \$6.77 per ton of seed crushed. The said Linter Committee was on said date about 5:30 o'clock in the afternoon advised that they would be given until 7:00 o'clock that evening to state whether or not they would accept said proposition, and that in case they declined to execute a modified contract in accordance with said proposition notices of cancelation would be wired the mills by the ordnance department at 7:00 p. m. sharp on said day. They were also advised that unless they accepted said proposition the ordnance department would decline to accept from any of the crushers any linters whatever, including those linters then on hand which had been inspected and tagged by the United States.

XXIX

That at the time said proposition was made the agreement between the United States and this petitioner and other cotton-seed crushers was in full force and effect, that the threatened action of the officials of the ordnance department to cancel said contract would have resulted in the collapse of the stabilization scheme and the financial failure and bankruptcy of many of the cotton-seed crushers and of banks which had advanced loans to them, and in widespread loss to seed buyers, refiners, farmers, merchants, and others associated with the cotton-seed industry, that the entire business fabric of the South would have been affected, that the action of said officials induced the cotton-seed crushers and the committee representing them to believe and fear that said stabilization and scheme of prices would fail, resulting in said loss. And that the food administration advised the crushers that if they failed to pay \$70.00 per ton for seed, as fixed by the said food administration, that the food administration would no longer maintain the stabilized scale of prices for the sale of the products of the crushers, great quantities of which the crushers had on hand manufactured out of seed for which they had paid \$70.00 per ton, thus producing a great financial loss and embarrassment that no prudent business man could stand, that said cotton-seed crushers, including this petitioner, had made commitments to farmers, seed buyers, merchants and others, whereby they were to purchase the entire crop of cotton-seed for the season of 1918-1919 at the said rate of \$70.00 basis per ton of seed, that they could not pay said price or carry out their obligations if the price of oil, meal, and hulls was stricken down, and that they could not continue to operate if said stabilization scheme was discontinued, that said cotton-seed crushers had represented to the farmers that the farmers would receive \$70.00 basis for each and every ton of seed produced during the season of 1918-19 no matter whether it was brought to the market early or late, and had, in reliance upon their agreement with the government and in order to avoid economic waste, which would result in the seed piling up in the hands of the crushers sooner than they could crush it, asked the farmers to hold back the seed

until the mills could handle it, that to have refused to pay the farmer the stabilized price of seed would have meant a violation of their obligation to the farmer and the breaking of promises made during the war emergency at the request of the government to have the farmers increase production. Said crushers were dependent upon the good will of the farmers of their sections to continue in business, that said cotton-seed crushers were unable to pay said price to the farmers for the balance of the season and absorb the loss in case of the cancelation of said contract, that the officials of the ordnance department in threatening to exercise such arbitrary power led this petitioner and other cotton-seed crushers to believe that their business was in imminent danger of loss and destruction, that at the time said threat was made the cotton-seed crushers had on hand linters which had been cut in compliance with the orders of the government, amounting to about 270,000 bales and in value worth between six and seven million dollars, that much of it had been inspected and tagged by the government, that the threatened refusal of the government to take even such linters induced the fear of ruination and bankruptcy, that at said time the cotton-seed crushers had about 1,000,000 tons of seed on hand which had not been crushed, and that there were in the hands of the farmers about 480,000 tons of seed, that cotton-seed crushing is a seasonal business and the seed will rot and the oil content will be reduced if the seed is not crushed within a reasonable time after it is ginned, all of which facts were duly known to the officials of the ordnance department, that the said Cotton Linter Committee and the other representatives of the cotton-seed crushing industry, as well as bankers, merchants, and others who were present in Washington at the time, believed that the threat of those clothed with official authority, if exerted, would destroy and damage the business of the cotton-seed crushers and would result in a financial crash, which would have disrupted the entire business fabric of many of the states of the South, that a refusal of the mills to pay the farmers the stabilized price would have been a breaking of faith with the entire business community upon which the good will of the mills' business life depended, that even those mills which were able temporarily to finance the loss could not have done so without shouldering a burden too hazardous for any prudent man to undertake, that the action of the officials of the government constituted legal duress and that the parties were not on equal terms, that the representatives of this petitioner and others, after a hurried conference, therefore notified the ordnance department that said proposition was accepted. This was done, however, under protest and for the sole reason that no alternative was offered.

XXX

That on the same day, to wit: December 30, 1918, the said ordnance department notified this petitioner and the other cotton-seed crushers by telegram that the contract which this petitioner had for the sale of linters

to the United States was canceled. A copy of said telegram is in words and figures as follows:

"Washington, D. C., December 30, 1918. Your contract for linters with Du Pont American Industries, Agent for United States Ordnance Department, is cancelled. Your committee has tentatively agreed upon a form of settlement contract. Reply Major Hawkins, Contract Section, Procurement Division."

That on or about January 2, 1919, the said ordnance department issued instructions to the Du Pont American Industries, Inc., with reference to the modified contract, containing among other things, the following:

"If any producer declines to execute such instrument, the Ordnance Department will authorize you to decline to accept from such producer any linters whatever, and the United States will reimburse you for any proper expenditures and costs incurred or resulting by reason of such action on your part."

XXXI

That a copy of said letter of January 2, 1919, together with a printed form of a modified contract was thereupon sent to this petitioner and the other cotton-seed crushers, all of whom were familiar with the negotiations which had been conducted and all of whom understood that there was no alternative except to execute the same, that this petitioner under the circumstances hereinabove set forth did execute said modified contract, a copy of which is hereto attached as "Exhibit 11" and made a part hereof, that said modified contract was signed under legal duress and solely because of the threat made by the officials of the United States, all as more fully above set forth, that there was no consideration whatever passing from the United States to this petitioner for said modified contract, that the United States neither paid any money nor parted with any other consideration whatever to this petitioner and undertook no obligation greater than it already had under the original printed contract, that it has not paid to this petitioner any sums which petitioner was not entitled to receive under the original agreement, that this petitioner received no benefit whatever from said modified contract to which it was not entitled under the original agreement, that the United States assumed no liability under the modified contract additional to what it had under the original agreement.

XXXII

That this petitioner has fully performed all the obligations on its part to be performed under the understanding had with the United States on May 1, 1918, and also under the printed agreement entered into on or about September, 1918, except as it has been obstructed and prevented from so doing by the United States, that it has at all times taken every precautionary and needful step to minimize losses which would accrue and which were occasioned by the default of the United States, that the

United States has, however, failed, neglected, and refused to perform the obligations on its part to be performed under said agreements, but that while the United States has taken and paid for all the linters which this petitioner produced during the year 1918, it has failed, neglected, and refused to make payments for linters produced from the seed crushed during the period from January 1, 1919, to August 1, 1919. That the United States has further failed to pay to this petitioner or to any one for or on its behalf the storage charges upon linters produced during said period from January 1, 1919, to August 1, 1919, as it had agreed to do under said written agreement, that the United States has failed, neglected, and refused to pay to this petitioner or to any one for or on its behalf the insurance charges upon linters produced during said period from January 1, 1919, to August 1, 1919, as in said agreement provided, that the United States because of its failure to take from this petitioner the linters produced by it for the period beginning January 1, 1919, to August 1, 1919, made it necessary for this petitioner in order to preserve said linters and to minimize the loss occasioned by said default of the government, to rebale, recondition, and handle said linters from time to time, all of which charges and payments made by this petitioner were occasioned by the failure, refusal, and neglect of the United States to carry out its contract, that under the terms of said understanding and agreement between the United States and this petitioner all of the linters produced during the entire period of the crushing season, including the period from January 1, 1919, to August 1, 1919, was to be sold to the government f. o. b. mills point of production, and this petitioner was to assume no part of the selling cost, the United States having agreed to pay to the Du Pont American Industries, Inc., a commission for purchasing said linters for the United States, that this petitioner in order to minimize the loss occasioned by the failure, neglect, and refusal of the government to carry out its contract sold to others than the government certain of said linters after the United States had refused to take the same, and that this petitioner should receive from the United States the selling cost of such linters so sold.

Petitioner further says, under the terms of the said agreements by and between the United States and this petitioner, that the linters produced during the entire period of the crushing season, including the period from January 1, 1919, to August 1, 1919, the United States was to purchase said linters f. o. b. mills point of production, and that the freight charges on the same were to be equalized among the allocatees, and that this petitioner was not to bear or assume any of said charges, but that because of the failure, neglect, and refusal of the government to faithfully perform its contract and because petitioner was compelled to sell certain of said linters to others during said period from January 1, 1919, to August 1, 1919, petitioner was compelled to pay the freight charges on said linters so sold, and said freight charges should be borne and paid by the United States and this petitioner given reimbursement for the same.

Petitioner further states that it has received from the United States certain sums of money for linters produced during the period January 1, 1919, to August 1, 1919, being all the linters which the said United States consented to take, and that it has also received certain moneys for linters produced by it during the period from January 1, 1919, to August 1, 1919, and which it sold to others, at the best market price, than the United States government in order to minimize the losses.

XXXIII

Petitioner, therefore, submits the following as its claim against the defendant, the United States of America:

| | |
|--|-------------|
| For seed crushed during the period Jan. 1, 1919, to August 1, 1919, 1,750 tons at \$6.77 per ton..... | \$11,847.50 |
| “ storage charges upon linters produced during said period.... | |
| “ insurance charges upon linters produced during said period.... | |
| “ reconditioning charges upon linters produced during said period | |
| For selling cost of linters produced during said period and sold to others than the United States..... | |
| “ handling charges of linters produced during said period and sold to others than the United States..... | |
| “ freight charges on linters produced during said period and sold to others than the United States..... | |
| | <hr/> |
| | \$11,847.50 |
| Amount received from United States for linters produced during the period from January 1, 1919, to August 1, 1919..... | |
| “ received for linters produced and sold to others than the United States..... | \$3,175.77 |
| | <hr/> |
| | \$3,175.77 |
| Total balance claimed by petitioner..... | <hr/> |
| | \$8,671.73 |

XXXIV

Your petitioner further says that there are no claims liquidated or unliquidated of any kind or description existing in favor of the United States against your petitioner, which the said United States can set-off or counterclaim against this petitioner, and that by reason of the foregoing facts your petitioner is entitled to receive from the United States the total sum of \$8,671.73.

Wherefore, your petitioner has filed this its petition in this honorable court in order that it may make an investigation of all the facts relating to petitioner's claim against the United States, and prays this honorable

court that it may take such action as is proper under the provisions of the Act of March 3, 1911, known as the Judicial Code, and that it proceed in accordance with the provisions of section 151 of said act (U. S. C., Title 28, § 257) and report to the senate of the United States in accordance therewith.

Your petitioner further prays that this honorable court find that this petitioner might have presented its claim or brought its action under existing law and prosecuted the same to judgment, irrespective of the reference of the same to this court by the senate, and that this court may find that this petitioner has so presented its claim, and that it may further find that the United States is indebted to this petitioner in the sum of \$8,671.73, and that the same may be decreed to be a judgment against the United States in favor of this petitioner.

By
Jurat

STATE OF ——— }
COUNTY OF ——— } ss:

WA, being first duly sworn, deposes and says that he is the President of the ——— Manufacturing Company the petitioner named in the foregoing petition, that the statements contained therein are true and correct to the best of his knowledge and belief.

____—WA.

____—
Address.

Subscribed and sworn to before me this 2 day of July, 1923.

____—
Notary public.

Note.

A number of other cases of similar character were filed in the Court of Claims.

912. Petition for Congressional Reference.

In the Court of Claims of the United States

The Village of HS, Michigan

Plaintiff,

v.

The United States,

Defendant.

Congressional
No. ———.

PETITION

To the Honorable the Court of Claims of the United States:

The petition of the village of HS, Michigan, respectfully shows:

1. That the plaintiff, the village of HS, Michigan, is a duly incorporated village, organized under Public Act 3 of the Public Acts of the state of Michigan of 1895, that it has at all times borne true allegiance to the government of the United States of America and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government, that heretofore the Congress of the United States enacted an act, approved July 3, 1926, and known as Private, No. 266—69th Congress, entitled "An Act for the relief of the Village of HS, Michigan," which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the claim of the Village of Harbor Springs, Michigan, for reimbursement for the payment of judgment rendered by the United States District Court, Western District of Michigan, against said Village of Harbor Springs, Michigan, on account of the death of Ernest H. Haines, an employee of the Department of Agriculture, is hereby referred to the Court of Claims for determination of the facts as to the liability of the United States as a tort-feasor on account of the death of the said Ernest H. Haines.

"Approved, July, 3, 1926."

2. Plaintiff is the incorporated village named in said act and brings this suit under and pursuant to the terms thereof.

3. Plaintiff further states that it was named as defendant in a certain suit at law brought by EH, administratrix of the estate of HH, in the District Court of the United States for the — District of Michigan, — Division, in which suit a judgment (being the same judgment mentioned in the said Act of Congress aforesaid) was rendered against plaintiff in the sum of — dollars (\$—) as damages for the death of said HH, and said judgment was on the — day of —, 19—, satisfied in full by the payment by the plaintiff of said sum of — dollars (\$—) with interest and costs to said EH, administratrix aforesaid, a certified copy of said judgment marked "Exhibit A" and of the satisfaction thereof marked "Exhibit B" being attached hereto and made a part hereof.

4. Plaintiff states that on — —, 19—, the defendant, United States, acting through the Chief of the United States Weather Bureau, pursuant to the direction and authority of the Secretary of Agriculture, leased for a term of — years from the plaintiff a portion of Lot No. — of — Survey and plat of lands in section — in township — north, range — west, — County, Michigan, on which to erect a steel tower for the display of weather signals of said bureau, said lot of land being approximately — by — feet square. That after the expiration of said lease, to wit: On or about — —, 19—, the United States caused the same to be renewed for a further period of — years, to wit: Until on or about — —, 19—. Plaintiff states that it is unable to produce a copy of said lease, but that the original thereof, together with the extension of same is on file in the office of the Chief of the Weather Bureau

of the Department of Agriculture of the United States, that plaintiff has made due application to the Chief of said Weather Bureau for a photostatic copy of said lease and said extension thereof together with certain other documents pertaining to the same, that plaintiff is advised that said application was referred by the chief of said bureau, through the solicitor of the Department of Agriculture, to the Attorney-General of the United States, who, plaintiff is informed, rendered an opinion to the effect that it was not desirable that such photostatic copy be furnished to plaintiff, and the chief of said bureau has refused to furnish said copy to plaintiff.

5. That shortly after the making of said original lease, the defendant, acting through the weather bureau of the Department of Agriculture, caused to be erected on said leased land in accordance with its own plans and specifications, a steel tower for the display of signal lights, and maintained the same continuously up to and during the year 19—.

6. That at the time the said tower was erected, the plaintiff was engaged in operating an electric light plant for the lighting of the streets of said village and furnishing electricity to such persons as desired to purchase the same, and in the conduct of said business had erected and was maintaining poles on which its lines and wires were strung, and had erected and was maintaining near the lot leased by the defendant for the use of said weather bureau, a pole on which were strung electric wires in the conduct of its business as aforesaid.

7. That the defendant in erecting said steel tower, so constructed it as to bring one side of said tower in close proximity to the wires carried on said pole, and at that time or subsequently and prior to the death of said HH, hereinafter referred to, connected to said tower a steel ladder on the side nearest to said pole and wires, which ladder was for the use of said weather bureau's employees in tending and inspecting the signal lights of the tower.

8. That the ladder as so erected was in dangerous proximity to said wires and defendant's agents and employees then knew, or should have known, that the proximity of said ladder to said wires endangered the lives of its employees in using same to inspect the signals on said tower.

9. That subsequently, on ———, 19—, one HH, an employee of the defendant in the United States Weather Bureau, acting under instructions of his superior officer, the senior meteorologist and district forecaster for the District of ———, being the district in which said tower was located, undertook an inspection of said tower and the signals thereon, and to accomplish the same ascended said ladder and while on said ladder came in contact with a wire carried by said pole and was electrocuted and killed.

10. That subsequently, the administratrix of said HH, brought the suit against this plaintiff in the District Court of the United States for the ——— District of Michigan and recovered the judgment aforesaid which judgment, with interest and costs plaintiff as above stated has paid in full.

11. Plaintiff states that the danger to anyone using said ladder was or should have been known to the defendant and to the district officer of the weather bureau for the District of —, and to the other officers of the United States having control and supervision over the same, but notwithstanding said district officer and said other officers of the United States having control and supervision over the same, permitted said ladder to remain as erected and took no action to change its location on said tower, and failed to advise said HH of the dangerous location of said ladder in proximity to said wires, and because of the negligence of the United States, acting through its duly authorized agents as aforesaid in these regards, said HH met his death in the manner hereinbefore stated.

12. No other action than as aforesaid has been had on this claim in congress or by any of the executive departments of the United States. The plaintiff is and always has been the sole and absolute owner of the claim here presented and has made no transfer or assignment of said claim, or any part thereof, or of any interest therein, that said plaintiff is justly entitled to the sum of — dollars (\$—), with interest and costs, from the United States, against which sum there are no just credits or offsets; and that plaintiff believes the facts herein stated to be true.

Wherefore, the premises considered, plaintiff prays:

That this court may find material and relevant the facts showing the negligence of the defendant and its agents and the liability of the defendant as a tort-feasor on account of the death of the said HH, as aforesaid, in accordance with the terms of said Act of Congress approved — —, 19—; and

That plaintiff is justly entitled to be reimbursed by the defendant, the United States, for the sum paid by it on account of said judgment, to wit: The sum of — dollars (\$—) with interest and costs.

The village of HS, Michigan,

By _____

Attorney.

DISTRICT OF COLUMBIA, ss:

I, —, being duly sworn on oath depose and say that I am a member of the firm of —, attorneys of record for the village of HS, Michigan, a duly incorporated village, which is the village named as party claimant in the foregoing and attached petition, that I have read said petition and know the contents thereof, and that the facts therein stated upon personal knowledge are true and those therein stated upon information and belief I believe to be true.

Address.

Subscribed and sworn to before me this — day of —, 19—.

Notary public.

913. Petition in Action for Taking of Property by Eminent Domain.

In the Court of Claims of the United States

No. —

— Railroad Company, a West Virginia Corporation, and — Company, a West Virginia Corporation,
Petitioners,
v.
The United States of America,
Defendant.

PETITION

To the Honorable the judges of said court:

Plaintiffs' petition respectfully represents:

1. Plaintiff, KN Railroad Company, is a West Virginia corporation engaged in the operation of a railroad in — County, West Virginia, and as part of said railroad, for a number of years prior to — —, 19—, owned and operated a river tipple with appurtenant ice breakers hereinafter referred to on the north bank of the — River, immediately below the mouth of — Creek.

2. Plaintiff, KC Company, is a West Virginia corporation engaged principally in the mining and shipping of coal in — County, West Virginia, and is the owner of all of the capital stock of KN Railroad Company, and is likewise the holder of all of the outstanding bonded indebtedness of KN Railroad Company, which said bonded indebtedness is secured by deed of trust upon said railroad including the river tipple and ice breakers aforesaid, made by KN Railroad Company to K Banking & Trust Company dated — —, 19—, and recorded in book —, page —, in the county clerk's office.

3. Plaintiff, KC Company, is the owner and holder of a leasehold estate for — years from — —, 19—, whereby it has the right to mine and carry away all of the coal in and underlying a large tract of coal land in — County, West Virginia, along the line of the railroad owned and operated by plaintiff, KN Railroad Company, and the principal business of KN Railroad Company is hauling shipments of coal from the mines of KC Company in — County, West Virginia, either to the intersection of its railroad with the railroad operated by KM Railway Company or to and over the river tipple hereinbefore and hereinafter mentioned.

4. By virtue of a certain agreement or deed of lease among KE Railway Company, a West Virginia corporation, party of the first part, plaintiff KN Railroad Company, party of the second part, and plaintiff KC

Company, party of the third part, dated — —, 19—, and recorded in the clerk's office of — County, West Virginia, in lease book vol. —, page —, a true and correct copy of which is hereto attached, made part hereof, and marked Exhibit "A," plaintiff, KN Railroad Company, acquired and has since continuously owned, possessed, and enjoyed, a leasehold estate for a period of — years from — —, 19—, in and to certain lands and riparian or moorage rights along the — River in — County, West Virginia, which said land and moorage rights are, inter alia, described as follows in said deed of lease and agreement, viz.: [Here follows description].

5. Said deed of lease and agreement referred to in paragraph 4 hereof recites that plaintiff, KC Company, has acquired by deed of lease from WW, trustee, and others, a leasehold estate of — years from the — day of —, 19—, on a large tract of coal land along the then proposed line of KN Railroad Company mentioned in paragraph 3 hereof, and that the successful development of said coal land and operation of its contemplated business is dependent upon the early construction of said railroad, for which reason, plaintiff, KC Company, became guarantor for the observance and faithful performance by plaintiff KN Railroad Company, of the several agreements and conditions imposed by lessor, KE Railway Company, upon plaintiff, KN Railroad Company. Under the terms of said deed of lease, plaintiff, KN Railroad Company agreed to pay a rental and to construct a standard gauge railroad on the right of way, and to operate thereon a railroad in accordance with the general railroad law and other laws of the state of West Virginia then existing or which might from time to time thereafter be enacted, and agreed to perform various covenants and agreements which are more fully set forth in said deed of lease. By the terms of said lease the leasehold estate granted to KN Railroad Company is coextensive with the leasehold of plaintiff, KC Company, referred to in said deed of lease and agreement dated — —, 19—, and it is further provided that so far as the lessor is concerned, plaintiff, KC Company, is to be treated, at the option of the lessor, as if joining in and jointly and severally bound by each and every of the covenants undertaken by plaintiff, KN Railroad Company.

6. In the year 19— both plaintiffs entered into possession of the properties described in said deed of lease mentioned in paragraphs 4 and 5 and have continuously to the present time remained in possession and enjoyment thereof (except the portions which were taken and appropriated by defendant as hereinafter set forth), and said deed of lease and agreement heretofore mentioned is still in full force and effect; and pursuant to the terms of said lease, plaintiffs have constructed the standard gauge railroad mentioned therein and have at one terminus thereof erected the river tipple with appurtenant ice breakers hereinbefore and hereinafter referred to. Said river tipple and a portion of said railroad were, until the acts of the defendant hereinafter complained of, located upon and formed part of the four acre tract described in paragraph 4 hereof. Said

ice breakers are erected upon land located along the southeasterly boundary line of said four acre tract between natural low water mark (at an elevation of — feet above mean sea level Sandy Hook Datum) and an elevation of — feet, the pool level established by the acts of the defendant hereinafter complained of and likewise form a part of said four acre tract and of lands subject to the moorage rights first described in paragraph 4 hereof. The foundations of said tipple, with the exception of one outer pier thereof located in the river, were located entirely upon lands lying entirely above the normal pool level and normal high watermark established for the — River before the acts of the defendant hereinafter complained of. Said tipple was a large frame and steel structure into which railroad cars were moved and unloaded, and it was constructed with machinery and equipment whereby the contents of the loaded railroad cars were safely and efficiently loaded into barges floating upon the — River, thence to be moved by tugboat. Said tipple required protection against the destructive action of ice and other floating materials, and for this purpose plaintiffs constructed ice breakers or piers upstream from said tipple in the location hereinbefore set forth. Said tipple and ice breakers constituted, and, since their construction in 19— until taken, appropriated, and destroyed by the defendant in the year 19— as hereinafter set forth, were continuously used and operated as, a portion of the railroad of the plaintiffs aforesaid. In said period of time from 19— to 19—, many millions of tons of coal were shipped and handled over and through said railroad and tipple on said four acre tract.

7. Said tipple and ice breakers were erected and constructed pursuant to permission granted under authority of section 10 of an Act of Congress approved March 3, 1899, by Honorable ER, then Secretary of War of the United States, evidenced by a permit issued by him bearing the date — —, 19—, and were located on the north bank of the — River, below the mouth of KC, as shown on the sketch attached to the aforesaid permit, and were erected according to plans shown on said sketch, a copy of said permit and attached sketch being attached hereto and made part hereof and marked Exhibit "B."

8. At no time since the issuing of the permit referred to in paragraph 7 hereof has the Secretary of War of the United States ever revoked or withdrawn said permit or ever determined or declared that said tipple or ice breakers were an unreasonable obstruction to free navigation. Neither has the Secretary of War nor any other officer of the United States ever notified plaintiffs, or either of them, to remove or alter the same in any way so as to render navigation through the waters of the — River reasonably free, easy and unobstructed.

9. At the time of the erection and construction of the river tipple and ice breakers in 19—, the water of the — River had been artificially raised above the natural low watermark, to above a point above the natural high watermark, by the erection and construction some distance

downstream from said tipple of socalled Dam No. — of the — River. Said Dam No. — did thereafter and until the times mentioned in paragraph 11 hereof maintain the level of the waters of the — River at or above the natural low watermark and natural high watermark of said river at a river stage or pool level or elevation of approximately — feet above mean sea level, Sandy Hook Datum, which said stage or pool level has been fixed and adopted by the war department of the United States of America and Corps of Engineers of the United States Army as representing the high watermark of said — River at that point as of the time prior to the erection of the Marmet Dam hereinafter referred to.

10. Pursuant to authority granted by an Act of Congress approved July 3, 1930, 46 Stat. 918, and pursuant to consent granted by the legislature of the state of West Virginia in accordance with the 17th clause of section 8 of Article I of the Constitution of the United States, which said consent is evidenced by section 3, article I, chapter 1; section 1, article I, chapter 54; and clause (k), section 2, article I, chapter 54 of the Code of the State of West Virginia, 1931, being section 3, 5561 and 5362 of the West Virginia Code of 1932, the defendant did construct and put into operation and service in the year 1934, in and across the — River downstream from plaintiff's lands at or near —, — County, West Virginia, a dam consisting, inter alia, of five large roller gates each approximately — feet high and — feet long, the top of said gates being — feet above mean sea level, Sandy Hook Datum.

11. By the erection and construction of said new dam at —, and by putting the same into operation and service as stated in paragraph 10 hereof, defendant has caused the pool level of the — River at plaintiffs' lands to rise above the high watermark at an elevation of — feet above sea level to — feet above sea level, Sandy Hook Datum, or an increase in pool elevation of — feet above high watermark. The said pool level was raised by defendant as follows:

— —, 19—, from — feet to — feet;
— —, 19—, from — feet to — feet;
— —, 19—, from — feet to — feet,

above mean sea level, Sandy Hook Datum. Defendant has, since — —, 19—, maintained said pool level at — feet above sea level, as aforesaid, and plaintiffs aver defendant intends to maintain, and will continue indefinitely to maintain, said pool level at — feet above sea level.

12. As a result of the rise in pool level described in the foregoing paragraph from an elevation of — feet to an elevation of — feet, the lands and moorage rights of plaintiffs, together with the improvements thereon, have in part become flooded and submerged. Of the four acre tract first described in paragraph 4 hereof, — square feet, or — acres, lying along the bank of the — River were permanently flooded and thus taken, appropriated, and destroyed by defendant. Of the land covered

by moorage rights first described in paragraph 4 hereof, — square feet, or — acres, were permanently flooded and thus taken, appropriated, and destroyed by defendant. Of the moorage rights second described in paragraph 4 hereof, — square feet, or — acres, were permanently flooded and thus taken, appropriated, and destroyed. In calculating the areas flooded, there was included in the statement of area flooded only that land which lies above the normal pool level created by Dam No. —; that is to say, the land above the elevation of — feet, the high water-mark before the establishment of the new normal pool level of — feet created by the — Dam. The tipple and ice breakers aforesaid constituting the terminus of plaintiffs' railroad located upon the four acre tract and in part upon the — square feet thereof which were flooded, taken and appropriated by defendant, as aforesaid, were also submerged by said rise in pool level and the flooding of said lands to such an extent that the same were rendered useless and were thus taken, appropriated, and destroyed by defendant.

By reason of the taking, appropriation, and destruction of said land, tipple, and ice breakers, the railroad of plaintiff, KN Railroad Company, and all the land along which the same was laid, was damaged, injured, and in part destroyed, taken, and appropriated by defendant.

13. In order to minimize and mitigate the damages resulting to plaintiffs from defendant's acts set forth in paragraphs 10, 11, and 12 hereof, and to avoid total destruction of the usefulness of that portion of plaintiffs' railroad having its terminus in the river tipple aforesaid, it was necessary for plaintiffs, KN Railroad Company and KC Company, to build an entirely new tipple, to raise and strengthen the said ice piers or ice breakers, and build one new pier, and to erect steel piling along the river bank frontage of the said four acre tract.

14. By reason of the acts of the defendant hereinbefore complained of, that is to say the taking of their property by the permanent flooding of the land and improvements thereon leased by plaintiffs, as aforesaid, plaintiffs have suffered damages in the aggregate sum of — dollars (\$—), with interest thereon from — —, 19—.

15. Plaintiffs aver that the flooding of said land and improvements erected thereon, and the taking, appropriating, and destroying of the same, constitute a taking of plaintiffs' property for public use, and therefore aver that this suit is founded upon the Fifth Amendment to the Constitution of the United States, and is brought pursuant to authority conferred by section 1491 of Title 28 of the United States Code.

16. Plaintiffs aver that they are justly entitled to recover the amount hereinbefore and hereinafter claimed, after allowing all just credits and offsets.

17. No action has been taken on the claim stated in this petition by the congress of the United States. The office of the chief of engineers

of the war department of the United States, by letter dated — —, 19—, refused to make payment for any of the damages suffered by plaintiffs.

18. There has been no assignment or transfer of the claim herein made, or any part thereof.

19. Plaintiffs aver that there are no prior owners of the claim herein made, and further aver that plaintiffs in this claim have at all times borne true allegiance to the government of the United States, and have not, in any way, voluntarily aided, abetted, or given encouragement to rebellion against said government.

20. The acts of the defendant causing the flooding of plaintiffs' lands and improvements thereon and the said flooding of said lands and improvements thereon for which just compensation is claimed in this petition, first occurred within — years prior to the filing of this petition.

Wherefore, your petitioners pray judgment in their favor against the United States for the sum of — dollars (\$—), with interest from — —, 19—, and for such other and further relief as to the court may seem just.

KN Railroad Company,

By ———,

Its President.

KC Company,

By ———,

Its President.

Attorney for petitioners.

STATE OF —, }
COUNTY OF —. } ss:

Before me, a notary public in and for said county and state, personally appeared —, one of the officers, namely the president, of said KC Company, who is also president of KN Railroad Company, the other petitioner herein, who, being duly sworn, deposes and says that he is the holder of the offices aforesaid in the petitioning corporations, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to these matters he believes them to be true.

Sworn to and subscribed before me this — day of —, 19—.

Notary public.

914. Petition in Action for Taking of Contract by Eminent Domain.

In the Court of Claims of the United States

AB Corporation,

v.

The United States.

To the Honorable, the Court of Claims:

The plaintiff respectfully represents.

1. The plaintiff, AB Corporation, at all times hereinafter mentioned was and now is a corporation, incorporated and existing under the laws of the state of —.

2. On — —, 19—, the plaintiff as owner entered into a contract with CD Corporation, a corporation organized and existing under the laws of the state of —, as builder, whereby the said builder agreed to construct for said owner or its assigns, in a workmanlike manner, a single screw steel cargo steamer, according to plans and specifications in said contract set forth, to be delivered to said owner at the dock of the builder at —, on or before the — day of —, 19—, for which the owner was to pay to the builder the sum of — dollars (\$—), payable as follows: [Here insert].

3. Said builder had, up to — —, 19—, contracted for all of the materials, equipment, and supplies sufficient to complete said ship, and a large portion of such material, equipment, and supplies had been duly prepared and delivered to the yard of said builder prior to said date. The said builder had performed a large amount of labor under said contract prior to said date. The said builder, on said date, had fully complied with the terms of said contract, and was ready, able, and willing to complete the same in all particulars. The plaintiff on said date had fully complied with the terms of said contract, and was ready, able, and willing to complete the same in all particulars.

4. By the Act of June 15, 1917 (40 Stat. 182) the President was authorized to modify, suspend, cancel, or requisition any contract for the building, production, and purchase of ships, and to purchase, requisition, or take over any ship then constructed or in the process of construction or thereafter constructed. The President, by order dated — —, 19—, delegated said authority to the United States Shipping Board Emergency Fleet Corporation.

5. By order dated — —, 19—, the said United States Shipping Board Emergency Fleet Corporation, on behalf of the United States, requisitioned and took over from the plaintiff all the property, rights, and interests of the plaintiff in or under said contract. A copy of said order is hereunto annexed and marked "Exhibit A."

6. The fair and reasonable value of said property so requisitioned and taken and of which the plaintiff was deprived on said — day of —, 19—, as aforesaid, is — dollars (\$—), with interest from said day.

7. No other action has been had on said claim by the congress or by any executive department of the government of the United States; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim or of any part thereof or interest therein has been made. The plaintiff is justly entitled to the amount claimed herein from the United States after allowing all just credits and offsets. The plaintiff has at all times borne true allegiance to the government of the United States and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the government of the United States. The plaintiff is a citizen of the United States.

Wherefore, the plaintiff prays judgment against the United States for the sum of — dollars (\$—), with interest from — —, 19—.

Attorney for plaintiff.

Address.

(VERIFICATION)

Note.

See Brooks-Scanlon Corp. v. United States, 265 U. S. 106, 68 L. ed. 934, 44 Sup. Ct. 471.

CHAPTER 33—FEDERAL POWER COMMISSION

Form
1030. Petition to Federal Power Commission under Natural Gas Act of 1938.

Form
1031. Petition to modify or to set aside order of commission.

INTRODUCTION.—The Federal Power Commission, composed of five members, was created by the Federal Power Act (Act of June 10, 1920, as amended, 41 Stat. 1063; U. S. C., Title 16, § 792). It is charged with the duty of administering that act. One of its principal functions is the issuance of licenses to construct, operate, and maintain dams and similar structures and projects necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power in streams and other bodies of water over which congress has jurisdiction. The commission also regulates rates for the sale of electric energy in interstate commerce and authorizes the issuance of securities by public utilities engaged in this field.

The Federal Power Commission also administers the Natural Gas Act (Act of June 21, 1938, 52 Stat. 821; U. S. C., Title 15, ch. 15B), which governs the activities of persons engaged in transportation and sale of natural gas in interstate commerce.

1030. Petition to Federal Power Commission under Natural Gas Act of 1938.

To the Federal Power Commission:

The petitioner, the Illinois Commerce Commission, respectfully represents:

1. The petitioner, the Illinois Commerce Commission, is a commission organized and existing under the Public Utilities Act of the state of Illinois, and a state commission within the meaning of § 13 of the Natural Gas Act of 1938 (U. S. C., Title 15, § 717c), having its principal office in the city of — Illinois.

2. The AB Company is a corporation organized and existing under the laws of the state of —, having its principal office at —, and is a natural gas company engaged in the transportation of natural gas in interstate commerce for resale, within the meaning of § 2 (6) of the Natural Gas Act of 1938.

3. The CD Company is a corporation organized and existing under the laws of the state of —, having its principal office at —, and is a natural gas company engaged in the transportation and sale of natural gas in interstate commerce for resale.

[Here follow detailed allegations showing nature and volume of business done by the company, operating arrangements between the companies, capital structure, net earnings of companies, dividends paid, and relation between earnings and capital investment.]

4. The rates and charges for natural gas to the — District charged by AB Company, CD Company, and other public utilities are unjust and unreasonable in that —. The fixing of fair, just, and reasonable rates will materially aid this commission in fixing fair, just, and reasonable rates for gas sold to ultimate consumers in Illinois.

Wherefore, the petitioner prays that the Federal Power Commission make an order fixing fair, reasonable, and just rates for natural gas sold by AB Company, CD Company, and other public utilities in Illinois.

Dated at — —, 19—.

Illinois Commerce Commission

By ———— XY.

Secretary.

STATE OF —, }
COUNTY OF —. } ss:

XY, being duly sworn deposes and says that he is the secretary and duly authorized representative of the Illinois Commerce Commission to subscribe and verify the foregoing petition, that he has read the same and knows the contents thereof, and the matters stated therein are true to the best of his knowledge, information and belief.

————— XY.

Subscribed and sworn to before me this — day of —, 19—.

Notary public.

Note.

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U. S. 575, 86 L. ed. 1037, 62 Sup. Ct. 736. See Natural Gas

Act of 1938 (Act of June 21, 1938, 52 Stat. 821, § 4; 4 F. C. A., Title 15, § 717c; U. S. C. A., Title 15, § 717c; id. U. S. C.).

1031. Petition to Modify or to Set Aside Order of Commission.

United States Court of Appeals

For the ——— Circuit

| | |
|----------------------------|---|
| AB Company and CD Company, | } |
| Petitioners, | |
| v. | |
| Federal Power Commission, | |
| Respondent. | } |

To the United States Court of Appeals for the — Circuit:

AB Company and CD Company being aggrieved by the order made by the Federal Power Commission on — —, 19—, in a proceeding entitled "—," Docket No. —, do hereby respectfully petition this Honorable Court, pursuant to §313 (b) of Federal Power Act (U. S. C., Title 16, § 792), for a review of said order and respectfully show:

1. The petitioner AB Company is a corporation duly organized and existing under the laws of the state of —. Its principal place of business is at —.

2. The petitioner CD Company is a corporation organized and existing under the laws of the state of —. Its principal place of business is at —.

3. On — —, 19—, the petitioners made application to the Public Service Commission for the state of — for authorization and approval of the transfer of all the property, franchises, rights, licenses, and assets of said CD Company to said AB Company. After due consideration said commission made an order on — —, 19—, finding that the proposed transfer is fair, reasonable, and in the public interest, and granting said application.

4. On — —, 19—, the petitioners filed with the Federal Power Commission a joint application in a proceeding entitled "In the Matter of the Application of —." On — —, 19—, and after hearing on said application, the Federal Power Commission made an order denying said application. A copy of said order is hereto annexed and marked "Exhibit A."

5. On — —, 19—, the petitioners filed with the Federal Power Commission an application for rehearing on said application. On — —, 19—, the Federal Power Commission made an order denying the applica-

tion for rehearing. A copy of said order is hereto annexed and marked "Exhibit B."

6. The petitioners respectfully aver that the said order made by the Federal Power Commission on ———, 19—, is unreasonable, capricious, arbitrary, and contray to law, for the following reasons:

1. The commission erred in finding that [here insert] in that said finding is not supported by substantial evidence.
2. The commission erred in failing to find that [here insert], in that such failure to find was contrary to uncontradicted evidence.
3. The commission erred in holding that [here insert].
4. The commission erred as a matter of law in denying said application, in that [here insert].

Wherefore, the petitioners pray that said order of the Federal Power Commission made on ———, 19—, be reviewed by this Honorable Court, that said order be annulled and set aside, and that the Federal Power Commission be directed to make an appropriate order granting to the petitioners the authority and approval applied for by the petitioners, and for such other and further relief as to the court may seem just.

Respectfully submitted,

—— AB Corporation

By _____

—— CD Corporation

By _____

Attorney for petitioners.

Address.

Note.

Federal Power Comm. v. Pacific Power & Light Co., 307 U. S. 156, 83 L. ed. 1180, 59 Sup. Ct. 766. See Federal

Power Act, §§ 203, 313, 49 Stat. 849, 860; 5 F. C. A., Title 16, §§ 824(a), 825(1); U. S. C. A., Title 16, §§ 824(a), 825(1); id. U. S. C.

CHAPTER 34—OFFICE OF PRICE ADMINISTRATION

Form
1040. Protest.

Form
1041. Petition for amendment.

INTRODUCTION.—The Office of Price Administration, at the head of which is the price administrator, is an agency created by the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 37, U. S. C., Title 50, Appx. § 901 et seq., 11 F. C. A., Title 50, Appx. 25). The price administrator is clothed with authority to establish maximum prices and to ration commodities. His actions are subject to review exclusively by the Emergency Court of Appeals, a tribunal consisting of three or more judges designated by the Chief Justice of the United States from among United States circuit and district judges. The creation of this court was also authorized by the Emergency Price Control Act of 1942.

Cross-Reference.

For judicial review of actions of Office of Price Administration, see ch. 35, "Emergency Court of Appeals," p. 116 herein.

Secret Hearings.

Neither the administrator nor his representative can conduct secret hearings to examine purchaser of meat packer, but is entitled to make such examination at a public hearing, and while a witness

is not entitled to attend by counsel or a stenographer of his own choosing, yet such counsel and stenographer may attend hearings as members of the public and the stenographer may take notes of the proceedings, the court saying "We Americans * * * are distrustful and fearful of secret proceedings." *Brown v. Baer* (D. C.-Ill.), — Fed. Supp. —, 12 Law Week, § 2, p. 2185, decided Sept. 16, 1943.

1040. Protest.

Secretary,

Office of Price Administration,

Washington, D. C.

AB, hereby files this protest against the following provisions of maximum price regulation No. — (order No. —) (Price Schedule No. —) issued on — (effective on —), to wit:

1. The protestant AB, whose post-office address is — —, is engaged in the business of —, at —. He is subject to the aforesaid provisions in the following manner: [Here insert].

2. This protest is filed in behalf of the protestant by CD, whose post-office address is — —. All communications relating to this protest should be sent to said CD at — —.

3. The protestant makes the following objections against the said provisions: [Here follows enumeration].

4. In support of said objections, the protestant alleges the following facts: [Here insert].

5. The grounds of this protest arose on — —, 19—, by reason of the following facts: [Here insert].

Wherefore, the protestant requests that the following modifications be made in the provisions of said maximum price regulation (order) (price schedule): [Here insert].

————— AB.

STATE OF —, }
COUNTY OF —. } ss:

AB, being duly sworn, says he is the protestant herein, that this protest and the documents filed therewith were prepared in good faith and that the facts alleged are true to the best of his knowledge, information, and belief, that of the facts alleged the following are known to be true: [Here insert], and the following are alleged on information and belief: [Here insert].

————— AB.

Sworn to before me this — day of —, 19—.

—————
Notary public.

Notes.

Paragraph No. 5 should be used if protest is based on facts arising after date of issuance of maximum price regulation.

Emergency Price Control Act of 1942, § 203, 56 Stat. 31 (11 F. C. A., Title 50, Appx. 25; U. S. C. A., Title 50, Appx. § 901 et seq.; id. U. S. C.); Revised Procedural Regulation No. 1 of the Office of Price Administration, Rules 26-30.

1041. Petition for Amendment.

To the Honorable the Administrator of the Office of Price Administration:

The petition of AB respectfully shows

1. The petitioner AB resides at ———, and is engaged in the business of ———, and has his principal place of business at ———.
2. This petition relates to Maximum Price Regulation No. —, issued on ———, 19—.
3. The petitioner is subject to (affected by) the provisions of said maximum price regulation in the following manner: [Here insert].
4. The petitioner respectfully petitions that the following amendment be made to the said maximum price regulation: [Here insert].
5. The facts which make the foregoing amendment necessary and appropriate are as follows: [Here insert]. The evidence in support of the foregoing facts more fully appears in the affidavits of ———, ———, and ——— hereto annexed.

Wherefore, the petitioner prays that Maximum Price Regulation No. —, issued on ———, 19— be amended as aforesaid.

Petitioner.

Address.

STATE OF _____, }
COUNTY OF _____, } ss:

AB, being duly sworn, says that he is the petitioner above named, and that the facts alleged in this petition are true to the best of his knowledge, information, and belief.

AB.

Sworn to before me this — day of —, 19—.

Notary public.

Note.

See Revised Procedural Regulation No. 1 of the Office of Price Administration, Rules 20, 21.

NOTES TO DECISIONS

(Emergency Price Control Act of 1942, see 11 F. C. A., Title 50, Appxs. 25, 43; U. S. C. A., Title 50, Appx. § 901 et seq.; id. U. S. C.)

Attorney Fees.

In a suit involving \$50, an attorney's fee of \$25 was adequate, although serv-

ices rendered were worth more than the sum awarded. *Whatley v. Love* (La. App.), 13 So. (2d) 719.

Constitutionality.

In an action by the price administrator against a private citizen to enjoin alleged violations of regulations under this act, the defendant would have the right to question the constitutionality of the act. The court would permit inquiry into errors in the regulations under the general idea and preeminent requisite that a regulation must be fair and equitable, and may require plaintiff to make out his case before he shall be entitled to injunction. *Brown v. Wyatt Food Stores, Inc.* (D. C.-Tex.), 49 Fed. Supp. 538.

The provision of this act that the constitutionality of such act can be considered only by the Court of Emergency Appeals subject to review by the United States Supreme Court is a valid provision. *Whatley v. Love* (La. App.), 13 So. (2d) 719.

Construction.

Persons, corporations, partnerships, and other business organizations rendering these services are "producers" within the meaning of the phrase in § 302(c) of this act. 40 O. A. G. —, Oct. 27, 1942.

This act is not a penal statute although it imposes a penalty of treble damages. *Whatley v. Love* (La. App.), 13 So. (2d) 719.

Section 205 (e) of this act was not enacted to make public informers of the general public. *Tropp v. Great A. & P. Tea Co.*, — N. J. —, 32 Atl. (2d) 717.

Consumer Actions.

A consumer's right to bring an action for the sum of \$50, conferred by § 205 (e) of this act, does not make a judgment for this amount mandatory in the absence of language imposing a fixed liability on the seller. *Hall v. Chaltis* (Dist. of Col.), 31 Atl. (2d) 699; *Brown v. American Stores, Inc.* (Dist. of Col.), 32 Atl. (2d) 388.

Where there was no evidence of an intent to violate the ceiling price and the shelves were properly posted but through what was apparently an inadvertence on the part of a clerk the wrong ceiling price was placed on a can of Campbell's soup, the court properly limited the recovery of the consumer to \$5.00 instead of the maximum of \$50.00. *Brown v. American Stores, Inc.* (Dist. of Col.), 32 Atl. (2d) 388.

Viewed in a reasonable light § 205 (e) does not mean that every shopkeeper who makes an overcharge of even a few cents must forfeit \$50.00 to every customer who decides to sue. *Tropp v. Great A. & P. Tea Co.*, — N. J. —, 32 Atl. (2d) 717.

Unless plaintiff can show that the commodity was purchased "for use or consumption" and not merely to enrich

himself at the expense of the man in business there should be no recovery. *Tropp v. Great A. & P. Tea Co.*, — N. J. —, 32 Atl. (2d) 717.

Fifty dollar recovery permitted, under the circumstances of the case, in one action involving the sale of a quart jar of Miracle Whip Salad Dressing and no recovery permitted in the case of another sale of the same article at the same price. *Tropp v. Great A. & P. Tea Co.*, — N. J. —, 32 Atl. (2d) 717.

Injunction.

Where statutory conditions for the issuance of an injunction under this act are satisfied, the existence of the usual equitable grounds for relief, such as irreparable damages, need not be shown. *Henderson v. Burd* (C. C. A. 2), 133 Fed. (2d) 515.

Where, in an action by the administrator of the Office of Price Administration to enjoin violation of this act, it appeared from supporting and opposing affidavits upon motion for summary judgment for defendant that there was a genuine issue of fact, the motion would be denied. *Henderson v. Glosser* (D. C.-Pa.), 46 Fed. Supp. 458.

In an action to enjoin violations of this act, the plaintiff has clear burden to show violation of the act. *Henderson v. J. B. Beaird Corp.* (D. C.-La.), 48 Fed. Supp. 252.

Jurisdiction.

An action was properly brought in a city court to recover \$50 for violation of maximum rent regulation even though city court did not conduct a jury trial because the constitutional amendment guaranteeing right to trial by jury when the amount involved is over \$20 applies only to federal actions. *Whatley v. Love* (La. App.), 13 So. (2d) 719.

A suit to recover damages for violation of maximum rent control regulation was properly brought in a city court, but the question of constitutionality of this act could be considered only by the Court of Emergency Appeals, subject to review by the United States Supreme Court. *Tolle v. Love* (La. App.), 13 So. (2d) 724.

Maximum Rental.

In determining whether maximum rents established in the regulation are generally fair and equitable, consideration must be given to the overall operations of the landlord's properties as business units. Increased income due to fewer vacancies may be offset against increased costs of operation. *Chatlos v. Brown* (Em. C. A.), 136 Fed. (2d) 490.

Where basic rental of apartment to one person had been established at \$2.75

per week, if landlord wished to charge a higher rent when a family of six moved in he should proceed in conformity with the rent regulations under this act by filing a petition for adjustment to increase the maximum rent allowable. *Henderson v. Gandy* (D. C.-Pa.), 47 Fed. Supp. 381.

Protest against Rent Regulations.

In proceeding to review an order denying a protest against provisions of maximum rent regulation in a defense rental area, the petitioner had the burden of proving his contention that economies in operation did not represent real savings and should not be used to offset increases in certain items of expense because the economies resulted from deferred maintenance expenditures which would eventually have to be made. *Chatlos v. Brown* (Em. C. A.), 136 Fed. (2d) 490.

Changed conditions making rent regulations unfair or inequitable would afford to the landlord fresh ground for protest under § 203 (a) of this act, and review in the Emergency Court of Appeals under § 204 (a). *Chatlos v. Brown* (Em. C. A.), 136 Fed. (2d) 490.

Remedies of Landlord.

This act provides for an adequate administrative and judicial review of protests and petitions for adjustment filed in behalf of the landlord; hence the landlord is not entitled to an independent judicial determination of both facts and law by a three-judge federal district court on the issue of confiscation. *Henderson v. Kimmel* (D. C.-Kans.), 47 Fed. Supp. 635.

A landlord wishing to enjoin enforcement of a rent order of the Office of Price Administrator should have sought relief through a protest or a petition of adjustment, and if aggrieved by the administrative decision, through a complaint filed with the Emergency Court of Appeals set up by this act; and a three-judge federal district court had

no power to award any relief. *Henderson v. Kimmel* (D. C.-Kans.), 47 Fed. Supp. 635.

Subsidy Payments.

The Secretary of Agriculture is not precluded by any provision in this act or in the First Supplemental National Defense Appropriation Act, 1943, from paying subsidies otherwise authorized by law to canners of tomato juice under the circumstances stated. 40 O. A. G. —, Aug. 13, 1942.

The authority conferred by § 2(e) of this act upon corporations created under § 5d of the Reconstruction Finance Corporation Act (4 F. C. A., Title 15, § 606b, U. S. C. A., Title 15, § 606b; *id.* U. S. C.), includes authority to make subsidy payments for the type of services described in § 302(c) of the former act when these services are rendered with respect to materials defined by the President as strategic or critical. 40 O. A. G. —, Oct. 27, 1942.

Transactions in Tires.

The word "deliver" in tire rationing regulation of the Office of Price Administration applies to action of collector of customs in refusing to hand over imported tires to the importer although there is no question of importer's title and it has complied with all customs regulations and requirements. *Standard Oil Co. v. Angle* (C. C. A. 5), 128 Fed. (2d) 728.

Where title to tires had passed prior to the promulgation of regulations stopping transactions in new tires, but delivery had not been made, it was the duty of the seller to deliver them to the buyer when required to do so by the buyer; nevertheless, the administrator of the Office of Price Administration was entitled to an injunction preventing delivery of the tires, to be dissolved if the administrator should determine that the tires are not needed for public use. *Henderson v. Smith-Douglass Co., Inc.* (D. C.-Va.), 44 Fed. Supp. 681.

CHAPTER 35—EMERGENCY COURT OF APPEALS

Form

1050. Complaint to review regulation or order.

1051. Complaint to review price schedule.

Form

1052. Application for leave to introduce additional evidence.

1053. Motion to consolidate.

INTRODUCTION.—The Emergency Court of Appeals was created by § 204 of the Emergency Price Control Act of 1942 (Act of Jan. 30, 1942, 56 Stat. 23, 31; U. S. C., Title 50, Appx. § 901 et seq.) and consists of three or more judges designated from time to time by the Chief Justice of the

United States from among circuit and district judges. It has exclusive jurisdiction to review the validity of regulations, orders, and price schedules promulgated by the administrator of the Office of Price Administration. Proceedings to that end are instituted by filing a complaint with the court within thirty days after denial or partial denial of a protest filed with the administrator. The headquarters of the court are in Washington, D. C., in the building of the United States Court of Appeals for the District of Columbia.

Constitutional Law.

The power to fix maximum rents for housing accommodations is within the war power conferred upon congress by the constitution and this power was constitutionally delegated to the price administrator by the Emergency Price Control Act of 1942 (11 F. C. A., Title 50, Appx. 25; U. S. C. A., Title 50, Appx. § 901 et seq.; id. U. S. C.). *Taylor v. Brown* (Em. C. A.), 137 Fed. (2d) 654.

Price Regulations.

The administrator is not required to make formal findings of fact in support of his regulations; all that is required in the case of a price regulation is "a statement of the considerations involved in the issuance of such regulation." *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), — Fed. (2d) —.

Regulations in General.

Regulations issued by the administrator are presumptively valid. *Montgom-*

ery Ward & Co., Inc. v. Bowles (Em. C. A. 1943), — Fed. (2d) —.

The existence of a state of facts which justify a regulation issued by the administrator, is assumed without the necessity of proof thereof by the administrator. *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), — Fed. (2d) —.

Rent Regulations.

In the case of a rent regulation the necessity for the regulation of rents in the defense-rental area is required to be stated in the declaration and designation of the area which is required to be issued 60 days in advance of the rent regulation itself, but the act calls only for a summary recital of the basic facts from which the conclusion has been drawn. *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), — Fed. (2d) —.

1050. Complaint to Review Regulation or Order.

Emergency Court of Appeals

John Doe,

Complainant,

v.

Price Administrator,

Respondent.

Complaint

The complainant alleges:

1. The complainant is engaged in the business of —, and has his principal place of business at — —.

2. On — —, 19—, the respondent —, Price Administrator, issued a regulation (order) numbered — in words and figures following: [Here insert copy of regulation or order].

(Or in the alternative:

a copy of which is annexed hereto, marked "Exhibit A," and made a part of this complaint).

3. The complainant is subject to the provisions of said regulation (order).

4. On ———, 19—, the complainant filed a protest with the respondent specifically setting forth objections to certain provisions of said regulation (order). The said protest was in words and figures following: [A copy of said protest is hereto annexed, marked "Exhibit B," and made a part of this complaint].

5. On ———, 19—, the respondent denied said protest.

6. The complainant has been aggrieved by the denial of said protest in that ———.

7. The complainant specifies, asserts, and intends to rely upon the following objections to the said regulation (order):

1. That said regulation (order) is not in accordance with law, on the ground that [here insert].

2. That said regulation (order) is arbitrary and capricious, on the ground that [here insert].

Wherefore, the complainant prays that the enforcement of the aforesaid regulation (order) be restrained and enjoined and that the said regulation (order) be set aside and adjudged null and void.

Attorney for complainant.

Address.

Cross-References.

Complaint in consumer's action for treble damages, see Form 119.

Form of complaint, rule 16, p. 269 this supplement.

Notes.

Emergency Price Control Act of 1942, § 204 (a), Act of Jan. 30, 1942, 56 Stat. 31 (11 F. C. A., Title 50, Appx. 25; U. S. C. A., Title 50, Appx. § 924; id. U. S. C.), provides: "(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing

of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: Provided, that the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify

and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on re-

quest by the Administrator, any such evidence shall be presented directly to the court."

NOTES TO DECISIONS

Review of Regulations.

When a person subject to a price or rent regulation deems it invalid he may within the limited time fixed by the act seek to have it set aside by the Emergency Court of Appeals, § 204(a). But first he must file a protest with the Administrator in order to give that official an opportunity to grant relief if he thinks it is called for, § 203(a). The protest proceeding before the administrator is judicial in character since in it the protestant seeks individual relief from the regulation. *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), 138 Fed. (2d) 669.

The administrator is under no duty to incorporate in the record, in a complainant's protest proceeding or in the transcript filed in the Emergency Court of Appeals, the evidence which supports the facts set forth in the statement of considerations accompanying the regulation or the facts set forth in the opinion denying the protest. *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), 138 Fed. (2d) 669.

Where challenge as to validity of amendment to maximum price regulation was, not included in complaint, it came too late to be considered by the Emergency Court of Appeals. *Hickok Oil Corp. v. Fleming*, (EmCA), 161 F. (2d) 199.

Where non-processing slaughterer challenged maximum prices for veal he had the burden of proving that such prices were arbitrary and capricious. *Counselman v. Fleming*, (EmCA), 161 F. (2d) 203.

Review of maximum price regulation is restricted to issues raised in brief of complainant. *Publicker Industries, Inc. v. Fleming*, (EmCA), 162 F. (2d) 742.

Price administrator may not establish retroactively legal maximum prices to be applied in pending enforcement action against complainant. *Senderowitz v. Clark*, (EmCA), 162 F. (2d) 912.

Enforcement action against complainant did not make moot the issue presented by proceedings to review order of administrator denying protest. *Korach Bros. v. Clark*, (EmCA), 162 F. (2d) 1020.

1051. Complaint to Review Price Schedule.

Emergency Court of Appeals

John Doe,

Complainant,

v.

Price Administrator,
Respondent.

Complaint

The complainant alleges:

1. The complainant is engaged in the business of —, and has his principal place of business at —.
2. On —, 19—, the respondent —, Price Administrator issued a price schedule of prices of [here name commodity], in words and figures following: [Here insert copy of price schedule].

(Or in the alternative:

a copy of which is annexed hereto, marked "Exhibit A," and made a part of this complaint. The said price schedule became effective on —, 19—.)

3. The complainant is subject to said price schedule.

4. On ———, 19—, the complainant filed a protest with the respondent specifically setting forth objections to certain provisions of said price schedule. The said protest was in words and figures following: [A copy of said protest is hereto annexed, marked "Exhibit B," and made a part of this complaint].

5. On ———, 19—, the respondent denied said protest.

6. The complainant has been aggrieved by the denial of said protest in that ———.

7. The complainant specifies, asserts, and intends to rely on the following objections to said price schedule:

a. That said price schedule is not in accordance with law, on the ground that [here insert].

b. That said price schedule is arbitrary and capricious, on the ground that [here insert].

Wherefore, the complainant prays that the enforcement of the aforesaid price schedule be restrained and enjoined and the said price schedule be set aside and adjudged null and void.

Attorney for complainant.

Address.

Cross-Reference.

Complaint in consumer's action for treble damages, see Form 119.

1052. Application for Leave to Introduce Additional Evidence.

(Caption.)

The complainant hereby applies for leave to introduce additional evidence in the above-entitled proceeding.

The complainant hereby makes the following offer of proof with respect to the additional evidence sought to be introduced:

The character of the additional evidence is as follows: [Here insert].

The form of the additional evidence is as follows: [Here state names of witnesses if oral testimony is to be offered, or list of documents if evidence is to be documentary].

The additional evidence would show if admitted that [here summarize what the evidence would show].

The foregoing evidence was offered to the price administrator and not admitted [cite pages of transcript]

OR

The foregoing evidence could not reasonably have been offered to the price administrator for the following reasons: [Here insert].

and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on re-

quest by the Administrator, any such evidence shall be presented directly to the court."

NOTES TO DECISIONS

Review of Regulations.

When a person subject to a price or rent regulation deems it invalid he may within the limited time fixed by the act seek to have it set aside by the Emergency Court of Appeals, § 204(a). But first he must file a protest with the Administrator in order to give that official an opportunity to grant relief if he thinks it is called for, § 203(a). The protest proceeding before the administrator is judicial in character since in it the protestant seeks individual relief from the regulation. *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), 138 Fed. (2d) 669.

The administrator is under no duty to incorporate in the record, in a complainant's protest proceeding or in the transcript filed in the Emergency Court of Appeals, the evidence which supports the facts set forth in the statement of considerations accompanying the regulation or the facts set forth in the opinion denying the protest. *Montgomery Ward & Co., Inc. v. Bowles* (Em. C. A. 1943), 138 Fed. (2d) 669.

Where challenge as to validity of amendment to maximum price regulation was, not included in complaint, it came to late to be considered by the Emergency Court of Appeals. *Hickok Oil Corp. v. Fleming*, (EmCA), 161 F. (2d) 199.

Where non-processing slaughterer challenged maximum prices for veal he had the burden of proving that such prices were arbitrary and capricious. *Counselman v. Fleming*, (EmCA), 161 F. (2d) 203.

Review of maximum price regulation is restricted to issues raised in brief of complainant. *Publiker Industries, Inc. v. Fleming*. (EmCA), 162 F. (2d) 742.

Price administrator may not establish retroactively legal maximum prices to be applied in pending enforcement action against complainant. *Senderowitz v. Clark*, (EmCA), 162 F. (2d) 912.

Enforcement action against complainant did not make moot the issue presented by proceedings to review order of administrator denying protest. *Korach Bros. v. Clark*, (EmCA), 162 F. (2d) 1020.

1051. Complaint to Review Price Schedule.

Emergency Court of Appeals

John Doe,

Complainant,

v.

Complaint

Price Administrator,
Respondent.

The complainant alleges:

1. The complainant is engaged in the business of —, and has his principal place of business at —.

2. On —, 19—, the respondent —, Price Administrator issued a price schedule of prices of [here name commodity], in words and figures following: [Here insert copy of price schedule].

(Or in the alternative:

a copy of which is annexed hereto, marked "Exhibit A," and made a part of this complaint. The said price schedule became effective on —, 19—.)

3. The complainant is subject to said price schedule.

4. On ———, 19—, the complainant filed a protest with the respondent specifically setting forth objections to certain provisions of said price schedule. The said protest was in words and figures following: [A copy of said protest is hereto annexed, marked "Exhibit B," and made a part of this complaint].

5. On ———, 19—, the respondent denied said protest.

6. The complainant has been aggrieved by the denial of said protest in that ———.

7. The complainant specifies, asserts, and intends to rely on the following objections to said price schedule:

a. That said price schedule is not in accordance with law, on the ground that [here insert].

b. That said price schedule is arbitrary and capricious, on the ground that [here insert].

Wherefore, the complainant prays that the enforcement of the aforesaid price schedule be restrained and enjoined and the said price schedule be set aside and adjudged null and void.

Attorney for complainant.

Address.

Cross-Reference.

Complaint in consumer's action for treble damages, see Form 119.

1052. Application for Leave to Introduce Additional Evidence.

(Caption.)

The complainant hereby applies for leave to introduce additional evidence in the above-entitled proceeding.

The complainant hereby makes the following offer of proof with respect to the additional evidence sought to be introduced:

The character of the additional evidence is as follows: [Here insert].

The form of the additional evidence is as follows: [Here state names of witnesses if oral testimony is to be offered, or list of documents if evidence is to be documentary].

The additional evidence would show if admitted that [here summarize what the evidence would show].

The foregoing evidence was offered to the price administrator and not admitted [cite pages of transcript]

OR

The foregoing evidence could not reasonably have been offered to the price administrator for the following reasons: [Here insert].

The foregoing evidence is necessary to a proper disposition of the case for the following reasons: [Here insert].

Attorney for complainant.

Address.

Cross-Reference.

Introduction of evidence by leave of Court, rule 23, p. 272 this supplement.

NOTES TO DECISIONS

Where complainant by leave of United States District Court filed complaint under Section 204(e) 1 of Emergency Price Control Act (11 F. C. A., Title 50, Appx. 25, U. S. C., Tit. 50, Appx. 924(e), seeking determination as to invalidity of maximum price regulations relating to used refrigerators, vacuum cleaners, and washing machines, objection was made to complainant's application for leave to introduce additional evidence, under Rule

18a (Rule 23 of the Revised Rules) as being too uncertain because it did not recite specific facts to be introduced.

Complainant's application stated whether preferred evidence was written or oral, described witnesses who would give oral evidence, and documents which constituted written evidence, and summarized facts to be established. It sufficiently complied with Rule 18(a). *Flourney v. Bowles*, 148 F. (2d) 97.

1053. Motion to Consolidate.

(Caption.)

The complainant moves that the above-entitled proceeding be consolidated with the proceeding entitled "—, Complainant v. —, Price Administrator," Docket No. —, on the ground that said proceedings involve common questions of law (fact), to wit: [Here insert].

Attorney for complainant.

Address.

Cross-Reference.

Consolidating similar cases, rule 24, p. 273 this supplement.

CHAPTER 37—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT

Form

1060. Affidavit that defendant is not in military service.
1061. Affidavit that defendant is in military service and application for appointment of attorney.

Form

1062. Affidavit of inability to determine whether defendant is in military service and application for appointment of attorney.
1063. Order appointing attorney for party in military service.
1064. Order directing default judgment.

Form

1065. Motion to open default judgment.
 1066. Order opening default judgment.
 1067. Motion for stay of proceedings
 by soldier in person.
 1068. Motion for stay of proceedings
 filed by third person on behalf
 of soldier.

Form

1069. Order granting stay of proceed-
 ings.
 1070. Order granting stay of execution.
 1071. Order denying stay.

INTRODUCTION.—The Soldiers' and Sailors' Civil Relief Act of 1940 (Act of Oct. 17, 1940, 54 Stat. 1178; U. S. C., Title 50, Appx. § 501 et seq.) limits the entry of judgments by default against persons in the military or naval service, and confers on the courts in their discretion authority to grant stays of proceedings in any civil action to which such a person is a party. It is essential that strict compliance be had with the requirements of the statute, especially in cases in which a judgment by default is sought. In such instances proof must be submitted whether the adverse party is in the armed forces and, if he is, certain protective measures prescribed by the statute must be taken.

1060. Affidavit that Defendant is Not in Military Service.

(Caption.)

AB, being duly sworn, deposes and says:

1. He is the attorney for the plaintiff herein.
2. John Doe, defendant herein, is not in the military service, as appears from the following facts: [Here state facts in detail. The following are illustrative].

On ———, 19——, the deponent called on (telephoned to) the defendant at his residence at ———. In response to inquiry, the defendant stated that he was not in the military service and was employed by ———, at ———.

OR

On ———, 19——, the deponent called at defendant's home at ———, and interviewed his wife, who in response to inquiry stated that the defendant was employed at ——— in the capacity of ———.

OR

On ———, 19——, the deponent telephoned to the ——— Company at ———, and in response to inquiry was informed by the personnel manager that a person named John Doe was employed there in the capacity of ———, and that according to the company's record the residence of said John Doe is ———. The said residence is the residence of John Doe, defendant herein.

————— AB.

Address.

Subscribed and sworn to before me this ——— day of ———, 19——.

————— Name.

Official character.

Note.

Soldiers' and Sailors' Civil Relief Act, § 200 (1) and (3), Act of Oct. 17, 1940, 54 Stat. 1180 [11 F. C. A., Title 50, Appx. 9; U. S. C. A., Title 50, Appx. § 501(1) (3); id. U. S. C.], provides: "(1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such appointment.

Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act.

"* * *

"(3) In any action or proceeding in which a person in military service is a party if such party does not personally appear therein or is not represented by an authorized attorney, the court may appoint an attorney to represent him; and in such case a like bond may be required and an order made to protect the rights of such person. But no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his acts."

1061. Affidavit that Defendant is in the Military Service and Application for Appointment of Attorney.

(Caption.)

AB, being duly sworn, deposes and says:

1. He is the attorney for the plaintiff herein.
2. John Doe, the defendant herein, is in the military service, as deponent is informed and believes, to wit in the United States Army. John Doe is not represented by an attorney and deponent requests the court to appoint an attorney to represent the defendant and protect his interest, pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act (U. S. C., Title 50, Appx. § 501 et seq.).

____ AB.

Address.

Subscribed and sworn to before me this ____ day of ____, 19__.

Name.

Official character.

1062. Affidavit of Inability to Determine Whether Defendant is in Military Service and Application for Appointment of Attorney.

(Caption.)

AB, being duly sworn, deposes and says:

1. He is the attorney for the plaintiff herein.
2. After use of due diligence to ascertain the facts, he is unable to determine whether or not, John Doe, defendant herein, is in the military service.

3. John Doe is not represented by an attorney and deponent requests this court to appoint an attorney to represent the defendant and protect his interest, pursuant to the provisions of the Soldiers' and Sailors' Civil Relief Act (U. S. C., Title 50, Appx. § 501 et seq.).

_____ AB.

Address.

Subscribed and sworn to before me this ____ day of ____, 19__.

Name.

Official character.

1063. Order Appointing Attorney for Party in Military Service.

(Caption.)

It appearing that John Doe, the defendant herein, is in military service (that it can not be determined whether John Doe, the defendant herein, is in the military service) and has not personally appeared herein and is not represented by an authorized attorney, it is

Ordered, that ____, Esquire, of ____, an attorney and counselor at law, is hereby appointed to represent John Doe, defendant herein, and to protect his interests.

Date ____.

United States district judge.

1064. Order Directing Default Judgment.

(Caption.)

It appearing that the summons and complaint were served on John Doe, defendant herein, on ____ ____, 19__, that the time of said defendant to plead or otherwise defend expired on ____ ____, 19__, that he has failed to plead or otherwise defend, that he is in the military service, that he is not represented by an authorized attorney, that the court appointed ____, Esquire, of ____, an attorney and counselor at law, as attorney to represent him and protect his interests; it is

Ordered, that judgment by default be entered in favor of the plaintiff against John Doe, defendant herein, for the relief demanded in the complaint, on condition that before judgment is entered the plaintiff file a bond approved by the court in the sum of — dollars (\$—), conditioned to indemnify said defendant against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part.

Dated at —, —, 19—.

United States district judge.

Note.

Other or additional conditions may be imposed by the court.

1065. Motion to Open Default Judgment.

(Caption.)

John Doe, defendant herein, moves that the judgment entered herein on —, 19—, be opened and set aside and that he be permitted to defend, on the ground that at the time judgment was rendered against him, he was in the military service, that he was prejudiced by reason of his military service in making his defense to the action, and that he has a meritorious or legal defense to the action or some part thereof, all of which appears by his affidavit and his proposed answer, annexed hereto.

Date —.

Attorney for John Doe, Defendant.

1066. Order Opening Default Judgment.

(Caption.)

This action was heard on motion of John Doe, defendant herein, to open and set aside the judgment entered against him by default on —, 19—; and it appearing that at the time judgment was rendered against him, he was in the military service, by reason of which he was prejudiced in making his defense to this action, and that he has a meritorious or legal defense to the action or some part thereof, it is

Ordered, that the judgment entered herein on —, 19—, be opened and set aside and that John Doe, defendant herein, be permitted to defend and plead within — days from the date hereof.

Date —.

United States district judge.

Note.

Soldiers' and Sailors' Civil Relief Act, §§ 201, 202, 204, Act of Oct. 17, 1940, 54 Stat. 1181 (11 F. C. A., Title 50, Appx.

9; U. S. C. A., Title 50, Appx. §§ 521, 522, 524 et seq.; id. U. S. C., provides: § 201: "At any stage thereof any action or proceeding in any court in which a person

in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

§ 202: "In any action or proceeding commenced in any court against a person in military service, before or during the period of such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or

sought is not materially affected by reason of his military service—

"(a) Stay the execution of any judgment or order entered against such person, as provided in this Act; and

"(b) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment as provided in this Act."

§ 204: "Any stay of any action, proceeding, attachment, or execution, ordered by any court under the provisions of this Act may, except as otherwise provided, be ordered for the period of military service and three months thereafter or any part of such period, and subject to such terms as may be just, whether as to payment in installments of such amounts and at such times as the court may fix or otherwise. Where the person in military service is a co-defendant with others the plaintiff may nevertheless by leave of court proceed against the others."

1067. Motion for Stay of Proceedings by Soldier in Person.

(Caption.)

The defendant (plaintiff) John Doe, moves that the proceedings in this action be stayed as provided in the Soldiers' and Sailors' Civil Relief Act (U. S. C., Title 50, Appx. § 501 et seq.), on the ground that the defendant (plaintiff) is in the military service, as appears from the annexed affidavit.

Date ———.

Attorney for defendant.

Address.

NOTES TO DECISIONS

In General.

Whether a stay should be granted is in the discretion of the court. *Boone v. Lightner*, 319 U. S. 561, 87 L. ed. 1587, 63 Sup. Ct. 1223.

Statute should be liberally construed. *Royster v. Lederle* (C. C. A. 6), 128 Fed. (2d) 197.

Granting of a stay is discretionary with the court and stay may be denied where it appears proper to do so. *Swiderski v. Moodenbaugh* (D. C.-Ore.), 44 Fed. Supp. 687.

Stay granted in automobile collision case because defendant entered military service. *Lanham v. Cline* (D. C.-Idaho), 44 Fed. Supp. 897; *Bowsman v. Peterson* (D. C.-Nebr.), 45 Fed. Supp. 741.

The fact that soldier can testify by deposition is not ground for denying stay as he should be permitted to appear personally before the jury. *Bowsman v. Peterson* (D. C.-Nebr.), 45 Fed. Supp. 741.

1068. Motion for Stay of Proceedings Filed by Third Person on Behalf of Soldier.

(Caption.)

John Roe, in behalf of the defendant (plaintiff) John Doe, moves that the proceedings in this action be stayed as provided in the Soldiers' and Sailors' Civil Relief Act (U. S. C., Title 50, Appx. § 501 et seq.), on the ground that said John Doe is in the military service, as appears from the annexed affidavit.

Date —.

Attorney for defendant.

Address.

1069. Order Granting Stay of Proceedings.

(Caption.)

This action was heard on the motion of the defendant (plaintiff), John Doe for a stay, and it appearing that the defendant (plaintiff), John Doe is in the military service, it is

Ordered, that all proceedings in this action against the defendant (plaintiff) John Doe, be stayed until the expiration of three months after the discharge of the said defendant (plaintiff) from the military service.

(The court may attach conditions and make further provisions, such as the following: Ordered, that the plaintiff may nevertheless proceed against the other defendants.)

Date —.

United States district judge.**1070. Order Granting Stay of Execution.**

(Caption.)

This action was heard on the motion of the defendant, John Doe, for a stay of execution of judgment entered against him herein on — —, 19—, and it appearing that the said defendant is in the military service, it is

Ordered, that execution of the judgment entered herein on — —, 19—, and all other proceedings to enforce said judgment, be stayed until the expiration of three months after the discharge of the defendant, John Doe, from the military service;

(The court may in its discretion attach conditions such as the following: Ordered, that the foregoing stay be granted on condition that the said defendant make to the plaintiff payments on account of said judgment as follows: The sum of — dollars (\$—), on the — day of each month, until the judgment is paid in full; and in case the defendant

fails to make any payment herein provided for, the plaintiff may apply to this court for an order vacating the stay herein.)

Date ____.

United States district judge.

1071. Order Denying Stay.

(Caption.)

This action was heard on the motion of the defendant John Doe for a stay (of proceedings) (of execution) on the ground that he is in the military service, and the court being of the opinion that the ability of said defendant (to conduct his defense) (to comply with the judgment herein) is not materially affected by reason of his military service, it is

Ordered, that the motion for stay be denied.

Date ____.

United States district judge.

NOTES TO DECISIONS

(Soldiers' and Sailors' Civil Relief Act of 1940, see 11 F. C. A., Title 50, Appx. 9; U. S. C. A., Title 50, Appx. § 501 et seq.; id. U. S. C.)

Adoption Proceedings.

This act applies to proceedings for the adoption of a minor child of a person in the armed forces. In re Adoption of a Minor, — App. D. C. —, 136 Fed. (2d) 790.

Affidavits.

Regardless of whether defendant was under a duty to make disclosure of his situation with respect to the applicability of this act, once he undertook to do so the significance alike of what his affidavit said and of what it omitted was to be judged by ordinary tests. Boone v. Lightner, 319 U. S. 561, 87 L. ed. 1587, 63 Sup. Ct. 1223, affg. 222 N. Car. 205, 22 S. E. (2d) 426.

Where judge of land court found that mortgagor was not in military service within meaning of this act, his order that a new certificate of title be issued to purchaser under power of sale without requiring an affidavit that mortgagor was not in military service was not error. Petition of Institution for Savings, 309 Mass. 12, 33 N. E. (2d) 526, 137 A. L. R. 448.

The required affidavit should as nearly as practicable be made contemporaneously with the making and entry of the decree and should set forth facts relating to the military service of the party as of the day of the judgment and the decree should contain a recital as to

the method of compliance with the act. In re Cool's Estate, 10 N. J. Misc. 236, 18 Atl. (2d) 714.

Where answer and affidavit of defendant in military service contain nothing on which court could form an opinion as to whether or not his ability to conduct his defense was affected by his service, the court will take proof on the matter either in the form of affidavits or testimony. Jamaica Sav. Bank v. Bryan, 175 Misc. 978, 25 N. Y. S. (2d) 17.

Affidavit of process server averring that at the time of the service of the summons and complaint defendant was not in the military service of the United States did not comply with the requirements of this act. National Bank v. Van Tassell, 178 Misc. 776, 36 N. Y. S. (2d) 478.

The penalty provided in § 200(2) of this act for the filing of a false affidavit does not preclude the filing of a civil action for damages. Krobusek v. Warwick Realty Co., 24 Ohio Law Reporter 348.

Alimony.

Where judgment for arrears of alimony was signed without appearance by defendant, but before it was entered the court received a letter from defendant referring to this act, stating that defendant had no funds to pay—

and that he was an officer of the regular army subject to war department orders, the court would deem such letter to be an application for opening of the default and for the appointment of an attorney to protect defendant's interests. *Lang v. Lang*, 176 Misc. 213, 25 N. Y. S. (2d) 775.

Military service does not excuse compliance with alimony order if defendant is financially able to make payment. *Clarke v. Clarke*, — Misc. —, 25 N. Y. S. (2d) 64.

Appeals.

An order under this act staying proceedings in ejectment proceedings is not a final order from which an appeal may be prosecuted. *Piercy v. Baldwin*, — Ark. —, 168 S. W. (2d) 1110.

Where record on appeal showed that plaintiffs had not requested the trial court to impose any "terms" on defendants or that they asked the court to appoint a receiver upon granting a stay under this act, contention that the stay was granted without imposing just terms on defendants for the protection of plaintiffs could not be raised on appeal. *Hellberg v. Warner*, 319 Ill. App. 117, 48 N. E. (2d) 972.

Motion to dismiss appeal taken by an appellant in the armed forces from a judgment rendered before he was inducted would be denied where appellant's ability to conduct the appeal was materially affected by reason of his military service. *Shisler v. Becker*, — Misc. —, 38 N. Y. S. (2d) 60.

Where, in consolidated actions to recover for injuries sustained by plaintiffs resulting from the alleged negligent operation of an automobile by defendant, defendant filed a motion for relief under this act, and the court entered an order based upon a finding that defendant was represented by counsel, that his present whereabouts was unknown, that his presence in court at any future time was exceedingly questionable, and that the cases ought to be tried and there was no valid reason to the contrary, and on appeal from the order the assignments of error did not bring up for review the trial court's failure to find facts pertinent to the application of this act, defendant's appeal would be dismissed without prejudice to his right to renew the motion and have his rights thereupon determined. *Batts v. Little*, 222 N. Car. 353, 23 S. E. (2d) 41.

Application of Act.

This act is applicable to all agencies of the federal government and, therefore, to the several lending programs of the Department of Agriculture. 40 O. A. G. —, June 18, 1941.

This act has no application to a retired army officer who is not on active duty. *Lang v. Lang*, 176 Misc. 213, 25 N. Y. S. (2d) 775.

This act has application only when the military service in fact has prevented or is preventing the member of the military forces from meeting the obligations imposed upon him by the instrument sued upon. *Brooklyn Trust Co. v. Papa*, — Misc. —, 33 N. Y. S. (2d) 57.

Appointment of Attorney.

Section 200 of this act does not apply when defendant has appointed his own attorneys to protect his interests. *Reynolds v. Reynolds*, — Cal. (2d series) —, 134 Pac. (2d) 251.

An appointment of attorney should be made whenever question arises, so that the rights of all parties may be protected. In *re Cool's Estate*, 10 N. J. Misc. 236, 18 Atl. (2d) 714.

Ordinarily the services rendered by proctor and counsel appointed under this act are to be regarded as a patriotic duty for which no compensation would be expected as against a party in military service; however, in cases in which allowances are commonly made according to the usual probate practice, reasonable compensation may be awarded. In *re Cool's Estate*, 10 N. J. Misc. 236, 18 Atl. (2d) 714.

In an action to foreclose mortgage, one of the defendants owning an interest in the mortgaged property was in military service and the court appointed an attorney to represent such defendant, it was held to be within the inherent power of the court, independent of statute or rule, to allow such attorney taxable costs as an expense in the action. *Weynberg v. Downey*, 176 Misc. 196, 25 N. Y. S. (2d) 600.

Bills and Notes.

Before parties to a note who did not participate in the consideration can secure a stay under this act, it must first appear that a stay is already operative in favor of the obligor in military service. *Modern Industrial Bank v. Zaentz*, 177 Misc. 132, 29 N. Y. S. (2d) 969.

Where imposition of delinquency fine under New York banking law on maker of note payable to industrial bank was due to maker's absence in military service, the court could relieve him of the fine. *Modern Industrial Bank v. Zaentz*, 177 Misc. 132, 29 N. Y. S. (2d) 969.

Where the papers before the court on motion for stay filed by defendants who did not participate in consideration for which note was given did not show whether the obligor who received the consideration was a party defendant or the recipient of a stay under this act,

there was no basis for the exercise or denial of discretion in favor of the movant parties. *Modern Industrial Bank v. Zaentz*, 177 Misc. 132, 29 N. Y. S. (2d) 969.

The comaker of a note executed by himself and a person in the military service was not within this act under the phrase "and others subject to the obligation or liability," although he did not receive any of the proceeds of the loan for which the note was given. *In re Itzkowitz*, 177 Misc. 269, 30 N. Y. S. (2d) 336.

Where, in an action on a note, defendant maker who was in military service was represented by counsel, and no proper legal defense was interposed, motion of comakers who were not in the service for a stay would be denied. *Modern Industrial Bank v. Grossman*, — Misc. —, 40 N. Y. S. (2d) 628.

Before an accommodation maker can secure a stay, it must first appear that a stay is already operative in favor of the obligor in military service. *Modern Industrial Bank v. Grossman*, — Misc. —, 40 N. Y. S. (2d) 628.

Bond.

Trial court erred in requiring mortgagor to give bond to indemnify defendant, who was in military service, against loss or damage, since defendant could not have been injured in any way by the seizure and sale of his automobile. *Price v. Phillips* (La. App.), 12 So. (2d) 59.

Chattel Mortgages and Liens.

Trial court properly refused to stay foreclosure proceedings where less than 50 per cent of the purchase price of automobile had been paid. *Price v. Phillips* (La. App.), 12 So. (2d) 59.

In suit to foreclose chattel mortgage and vendor's lien executed to secure balance of purchase price on automobile, subsequent to the approval of this act, the trial court properly refused to stay proceedings because act applies only to obligations originating prior to approval of said act. *Price v. Phillips* (La. App.), 12 So. (2d) 59.

The provision of the 1942 amendment concerning foreclosure of mortgages has controlling effect over prior laws contrary thereto. *Commercial Secur. Co., Inc. v. Kavanaugh* (La. App.), 13 So. (2d) 533.

A mortgagee may institute a suit against an induttee in military service to foreclose a vendor's lien and mortgage on an automobile if the deprivation of the automobile would not constitute an undue hardship on the dependents of the person in military service, and resort to the act is not barred because an induttee's ability to discharge his financial

obligations promptly is materially affected by reason of military service. *Commercial Secur. Co., Inc. v. Kavanaugh* (La. App.), 13 So. (2d) 533.

In a suit to foreclose a vendor's lien and mortgage on an automobile of an induttee in military service, an order of the trial court to have the car appraised by disinterested parties, and the order to have the equity of defendant therein paid to defendant induttee, would be making "such other disposition of the case as may be equitable to conserve the interests of all parties." *Commercial Secur. Co., Inc. v. Kavanaugh* (La. App.), 13 So. (2d) 533.

Where seizure of car of member of enlisted reserve corps was legal when made, such owner would be entitled, upon the 1942 amendments to this act becoming effective, to a stay of the enforcement of his obligation to respondent for the period of his military service, subject to the payment of the balance of principal and accumulated interest due and unpaid at the termination of his military service. *In re Aber*, — Misc. —, 40 N. Y. S. (2d) 48.

Seizure of a car, prior to the effective date of the 1942 amendments of this act, of a member of the enlisted reserve corps, did not violate this act; but a sale of the car without a court order under such seizure after the effective date of said amendments would be illegal. *In re Aber*, — Misc. —, 40 N. Y. S. (2d) 48.

In an action to set aside transfers of mortgaged personalty to defendant soldier on the ground of fraud, defendant's motion for continuance of the case for the duration of the war setting out that because of his military service he could not attend the trial to protect his best interests should be granted. *Bridges v. Williams* (Tex. Civ. App.), 171 S. W. (2d) 372.

Child Support.

A nonresident officer of the armed forces of the United States who is temporarily in a state on official business is not as a matter of public policy, exempt from process in a civil action brought by his divorced wife to recover from the officer money alleged to be due under a written contract for the support of the minor child of the parties. *Tulley v. Superior Court*, 45 Cal. App. (2d series) 24, 113 Pac. (2d) 477.

Where, in action for divorce, notice that plaintiff would apply for an increase in allowance for support of parties' children was served on defendant who was a nonresident by mailing copies of the papers to defendant's attorneys of record, provision of this act for appointment of attorney to repre-

sent defendant absent in military service upon default was not applicable, since defendant was already represented by counsel. *Reynolds v. Reynolds*, — Cal. App. (2d series) —, 128 Pac. (2d) 172.

The court will not stay proceeding for support allowance for minor children of soldier instituted by his former wife because the father was in the armed services, if it is shown that the father, receiving his own subsistence from the government, has the means to provide for them. *Kelley v. Kelley*, — Misc. —, 38 N. Y. S. (2d) 344.

Construction in General.

This act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation. *Boone v. Lightner*, — U. S. —, 87 L. ed. —, 63 Sup. Ct. 1223, affg. 222 N. Car. 205, 22 S. E. (2d) 426. To same effect, *Reynolds v. Haulcroft*, — Ark. —, 170 S. W. (2d) 678; *Hellberg v. Warner*, 319 Ill. App. 117, 48 N. E. (2d) 972; *Laperouse v. Eagle Indemn. Co.*, 202 La. 686, 12 So. (2d) 680; *Franklin Soc. for Home Building & Sav. v. Flavin*, 265 App. Div. 720, 40 N. Y. S. (2d) 582; *Modern Industrial Bank v. Grossman*, — Misc. —, 40 N. Y. S. (2d) 628; *In re Bashor*, — Wash. (2d series) —, 132 Pac. (2d) 1027.

The use of the terms "eviction" and "distress" in connection with the reference to maximum rental clearly indicates that the statute refers to the relationship of landlord and tenant. *Leshner v. Louisville Gas & Elec. Co. (D. C.-Ky.)*, 49 Fed. Supp. 88.

This statute was intended solely for the benefit of those in the armed services of the United States and is to be liberally construed to effectuate its purpose, but this does not mean that the courts are to enter into the field of speculation and go beyond the plain import of the language of the statute. *Oliver v. Oliver*, — Ala. —, 12 So. (2d) 852.

The purpose of this act is to relieve a person engaged in military service from the mental distress occasioned by the handicap of his being in the military service, resulting in his inability to function with the freedom of action which he possessed prior to his induction into the military establishment, causing inability to meet financial and other obligations and commitments. *Reynolds v. Haulcroft*, — Ark. —, 170 S. W. (2d) 678.

The word "defendant" in § 201 of this act should be given a liberal construction. *In re Adoption of a Minor*, — App. D. C. —, 136 Fed. (2d) 790.

This act was not intended to serve as an instrument by which one in military service may endanger the peace, the

health, and the lives of the people by staying any proceeding brought for the purpose of protecting the general public. *Cedartown v. Pickett*, 194 Ga. 508, 22 S. E. (2d) 318.

The purpose of this act is to prevent injuries to the civil rights of those in the armed services of the United States during that service in order that they may be free to devote all their energies to the military needs of the nation. *Laperouse v. Eagle Indemn. Co.*, 202 La. 686, 12 So. (2d) 680; *In re Bashor*, — Wash. (2d series) —, 132 Pac. (2d) 1027.

This act, requiring an affidavit that the defendant is not in military service before the court can proceed, is not involved in a proceeding for writ of prohibition to prohibit a special judge from trying a case in which relator is defendant on the ground that when the regular judge was called into the military service of the United States in the national guard he vacated his judicial position. *State ex rel. McGaughey v. Grayston*, — Mo. —, 163 S. W. (2d) 335.

A liberal construction should be given this act so that in probate court proceedings in default of any appearance by an interested party, either male or female, an affidavit as to military service should be filed or other action taken in accordance therewith, and only in that way will decrees import that finality to which all parties are entitled. *In re Cool's Estate*, 10 N. J. Misc. 236, 18 Atl. (2d) 714.

The words "order previously granted" in the 1942 amendment of § 302(3) of this act mean an order granted previous to the commencement of military service, and not one previous to the enactment of the amending act. *Stability Bldg. & Loan Assn. v. Liebowitz*, 132 N. J. Eq. 477, 28 Atl. (2d) 653.

The act is not to be employed as a means of enabling one who has flouted his obligations in civilian life to obtain indefinite delay or to cancel his just liabilities. *Franklin Soc. for Home-Building & Sav. v. Flavin*, 265 App. Div. 720, 40 N. Y. S. (2d) 582.

The words "and others subject to the obligation or liability" do not refer to primary obligors. *In re Itzkowitz*, 177 Misc. 269, 30 N. Y. S. (2d) 336.

This act is not to be employed as a vehicle of oppression or abuse; its invocation is not to be permitted for any needless or unwarranted purpose; it is to be administered as an instrument to accomplish substantial justice; and it is clear that complete immunity was not intended. *Nassau Sav. & Loan Assn. v. Ormond*, 179 Misc. 447, 39 N. Y. S. (2d) 92.

Section 302(2) of this act requires that the courts make such a disposition as may be equitable to conserve the interests of all parties. *Railroad Fed. Sav. & Loan Assn. v. Morrison*, 179 Misc. 893, 40 N. Y. S. (2d) 319.

This statute is intended to protect a soldier or sailor in the military service during the pendency of an action before judgment and pending the determination of an appeal from said judgment. *Shisler v. Becker*, — Misc. —, 38 N. Y. S. (2d) 60.

This statute was neither intended as a means of abuse nor to apply without restriction. *Kelley v. Kelley*, — Misc. —, 38 N. Y. S. (2d) 344.

It was the manifest purpose of congress to temporarily suspend legal proceedings and transactions which may prejudice the civil rights of persons in the military service. *Modern Industrial Bank v. Grossman*, — Misc. —, 40 N. Y. S. (2d) 628.

This act is but declaratory of the common law, except in so far as it requires the courts to grant continuances. *State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 45 N. E. (2d) 763.

The popular impression that this act absolutely forbids legal proceedings against one in the military or naval service of the United States is without foundation. *Krobusek v. Warwick Realty Co.*, 24 Ohio Law Reporter 348.

Criminal Proceedings.

In an action for personal injuries and property damages resulting from an automobile collision, a stay of proceedings under this act was granted. *Bowsman v. Peterson* (D. C.-Nebr.), 45 Fed. Supp. 741.

In an action against a member of the armed service for injuries sustained in an automobile collision, defendant's motion for postponement of further action in the case was denied where it was shown that defendant carried a liability policy of insurance and that plaintiff offered to look solely to the insurer for the payment of any judgment she might obtain if there were no continuance. *Swiderski v. Moodenbaugh* (D. C.-Ore.), 45 Fed. Supp. 790.

In an action to recover for a small amount of damages to an automobile, the court should grant a continuance until such time as defendant could obtain a furlough to attend the trial. *Smith v. Sanders*, 293 Ky. 6, 168 S. W. (2d) 359.

Where, in action for damages for personal injuries, recovery was sought in an amount in excess of individual defendant's liability insurance coverage, a stay was properly granted as to him, although he had admitted his negligence by his answer to interrogatories. *Lape-*

rouse v. Eagle Indem. Co., 202 La. 686, 12 So. (2d) 680.

If the defendant in a criminal case is drawn into the military service under the Selective Service Act (11 F. C. A., Title 50, Appx. 5; U. S. C. A., Title 58, Appx. § 301 et seq.; id. U. S. C.) and thereby prevented from appearing to answer the criminal charge, a final judgment of forfeiture should not be rendered against the sureties on his bail bond, but it must be shown that the military service prevented the principal's appearance at the trial. *Ex parte Moore*, — Ala. —, 12 So. (2d) 77.

In a criminal prosecution, motion for continuance on the ground that a witness was absent in the armed forces was insufficient where it stated that the witness's whereabouts were unknown, the continuance was asked for the duration of the war, and it did not recite that the desired facts could not be shown by other witnesses. *Jones v. State*, — Ark. —, 171 S. W. (2d) 298.

The court erred in staying proceedings against an insurer, who, if sued alone, would have had no defense based on employee's military service. *Laperouse v. Eagle Indem. Co.*, 202 La. 686, 12 So. (2d) 680.

In an action for damages for injuries sustained in an automobile collision, application for examination of a defendant who was about to be inducted into the army was denied. *Curran v. Newstead*, — Misc. —, 40 N. Y. S. (2d) 886.

Where soldier and his father were sued jointly, assuming that the father was entitled to apply for a stay under this act, whether or not it should be granted was wholly within the discretion of the trial court, and its decision would not be reviewed by certiorari. *State ex rel. Frank v. Bunge*, — Wash. (2d series) —, 133 Pac. (2d) 515.

Where defendant in suit for damages caused by an illuminating gas explosion had been trustee for the bondholders and mortgagee in possession of the gas company, but the active management of the company had been in charge of a local manager, and defendant was protected by liability insurance, the court properly refused a stay on account of his absence in the military service, reserving the right to grant a stay at any time his presence became necessary to protect him against cancellation of his insurance coverage. *Richey & Gilbert Co. v. Northwestern Natural Gas. Corp.*, — Wash. (2d series) —, 134 Pac. (2d) 444.

Debt Contracted after Effective Date of Act.

Trial court properly refused to reduce instalments of purchase price of automobile because debt was contracted after

approval of this act, and because mortgagee did not show how much he could pay, or in what way he would be prejudiced if court refused to reduce instalments. *Price v. Phillips* (La. App.), 12 So. (2d) 59.

This act was not intended to assist any man who obligated himself after it became effective, whether he were then in the service or thereafter inducted into the armed forces of our country. *Commercial Credit Corp. v. Brown* (Tex. Civ. App.), 166 S. W. (2d) 153.

Where, in an action to foreclose against certain property covered by a lien indebtedness, defendant assumed the indebtedness after the effective date of this act, act was not applicable although the original notes were executed prior to its effective date. *Erback v. Donald* (Tex. Civ. App.), 170 S. W. (2d) 289.

Disbarment Proceedings.

Where, in a disbarment proceeding, all the facts were presented to the trial committee in the presence of the respondent and prior to the time he was inducted into the military service, and all questions, except those to be decided by the state Supreme Court reviewing the acts of the trial committee and the board of governors, had been fully completed prior to the time respondent joined the army, and application for stay was not filed until after the case had been filed in the Supreme Court, stay would be refused. *In re Bashor*, — Wash. (2d series) —, 132 Pac. (2d) 1027.

Ejectment.

The provision of this act concerning eviction or distress (§300) should be liberally construed. *Leshner v. Louisville Gas & Elec. Co.* (D. C.-Ky.), 49 Fed. Supp. 88.

In proceeding to evict lessee, absent in armed forces, from leased premises for his alleged violation of provision in lease that lessee agrees not to offer for sale shoes, children's wear, hardware, and furniture on the leased premises, order of trial judge staying the proceedings only because of his opinion that there was an ambiguity in the lease necessitating the presence of lessee to determine the true intention of the parties, would be set aside. *Charles Tolmas, Inc. v. Streiffer*, 199 La. 25, 5 So. (2d) 372.

In action for ejectment by mortgagee against wife who held by the entirety and whose husband was a member of the naval reserve on active duty, military service of husband was not a defense. *Union Labor Life Ins. Co. v. Wendeborn*, 19 N. J. Misc. 496, 21 Atl. (2d) 317.

In an action in ejectment by a mortgagee against a married woman, motion to strike defendant's answer that de-

fendant and her husband were tenants by the entirety and that her husband had been called into active service as a member of the naval reserve and that therefore the action was barred by this act was granted, since the suit was not brought against anyone in the military service and was not brought to enforce any obligation arising from the mortgage. *Union Labor Life Ins. Co. v. Wendeborn*, 19 N. J. Misc. 496, 21 Atl. (2d) 317.

War Department Bulletin of Oct. 29, 1940 stated that a soldier's dependents shall not be evicted from their dwelling if the rental is \$80 or less per month, except upon leave of the court. The court is authorized to stay eviction proceedings for not more than three months if the soldier proves he is unable to pay the rent by reason of his military service. The Secretary of War is authorized to order an allotment of the soldier's pay to pay rent for his dependents. *Krobusek v. Warwick Realty Co.*, 24 Ohio Law Reporter 348.

Extension of Benefits to Dependents.

Under the 1942 amendment, benefits relating to rent, instalment contracts, mortgages, liens, assignments, and leases have been extended to dependents of persons in the military service. *Nassau Sav. & Loan Assn. v. Ormond*, 179 Misc. 447, 39 N. Y. S. (2d) 92.

Garnishment Proceedings.

Soldier was not entitled to stay of judgment against fund which garnishee had paid into court where the judgment was not against him and he was not a party to the garnishment case. *Pope v. United States Fidelity & Guaranty Co.*, 67 Ga. App. 560, 21 S. E. (2d) 289.

Trial court did not err in denying motion of soldier in service, filed in the main case, to vacate judgment against fund which garnishee admitted he owed defendant and which fund he had paid into court and then been discharged. *Pope v. United States Fidelity & Guaranty Co.*, 67 Ga. App. 560, 21 S. E. (2d) 289.

Landlord and Tenant.

In an action on a contract guaranteeing performance by defendant of a rental contract between defendant's son and plaintiff, where the lessee gave up possession upon his induction in August, 1941, and recovery was sought for rent for September and October, 1941, this act would be inapplicable; and the court would not decide as a matter of law that the lessee's induction canceled the lease, since such result would depend upon the facts and circumstances in the particular

case. *Jefferson Estates, Inc. v. Wilson*, — Misc. —, 39 N. Y. S. (2d) 502.

The fact that a lease was made in behalf of lessee's son did not entitle lessee to cancel the lease when the son entered the service. *Erich v. Landman*, — Misc. —, 40 N. Y. S. (2d) 516.

Mortgage Foreclosures on Real Property.

Where mortgagor and her son agreed that in consideration of the son's support of his mother and his making payments on the mortgage the mother would convey to him the premises subject to the mortgage, the son had an equitable, as distinguished from a moral, interest in the property which would be protected under this act when he went into the service, and which entitled him to intervene in foreclosure action. *Twitchell v. Home Owners Loan Corp.*, — Ariz. —, 122 Pac. (2d) 210.

No additional order of sale in a mortgage foreclosure suit is required by § 302 of this act, as amended in 1942, where after final decree, execution, and sheriff's advertisement of sale is begun, defendant enters military service. *Stability Bldg. & Loan Assn. v. Liebowitz*, 132 N. J. Eq. 477, 28 Atl. (2d) 653.

Application for stay of mortgage foreclosure proceeding would be denied, where defendant's defaults in payment of principal, interest, and taxes occurred long before his entry into the armed forces, and no personal judgment was sought against him. *Franklin Soc. for Home-Building & Sav. v. Flavin*, 265 App. Div. 720, 40 N. Y. S. (2d) 582.

Where husband and wife were defendants in an action to foreclose a mortgage, and the court could stay the action as to the husband because he was in military service, it likewise could stay the action as to the wife since she was also subject to the obligation of the bond; therefore proof should be submitted as to wife's income. *Jamaica Sav. Bank v. Bryan*, 175 Misc. 978, 25 N. Y. S. (2d) 17.

Where in an action to foreclose mortgage, defendant in military service is not the owner of mortgaged property, this section has no application. *Jamaica Sav. Bank v. Bryan*, 175 Misc. 978, 25 N. Y. S. (2d) 17.

Where in an action to foreclose a mortgage, defendant in military service is not the owner of the mortgaged property, the court, even if it stayed the action as to such defendant, could permit it to continue as to codefendants. *Jamaica Sav. Bank v. Bryan*, 175 Misc. 978, 25 N. Y. S. (2d) 17.

If in an action to foreclose a mortgage, defendant is prejudiced by his military service in conducting his defense, the court could stay all proceedings.

Jamaica Sav. Bank v. Bryan, 175 Misc. 978, 25 N. Y. S. (2d) 17.

In an action to foreclose a mortgage, the fact that defendant is in military service is not a defense to the action. *Jamaica Sav. Bank v. Bryan*, 175 Misc. 978, 25 N. Y. S. (2d) 17.

The fact that defendant in mortgage foreclosure action was in national guard, which only drilled twice a week, would not entitle him to relief under this act. *Jamaica Sav. Bank v. Bryan*, 176 Misc. 215, 25 N. Y. S. (2d) 641.

In an action to foreclose a mortgage, this act is not applicable to a defendant who was merely a nominal party. *Jamaica Sav. Bank v. Bryan*, 176 Misc. 215, 25 N. Y. S. (2d) 641.

In an action to foreclose a mortgage, stay of proceedings under this act would be granted only if the defendant's inability to comply with the terms of the mortgage results by reason of his military service, and such military service has materially affected the ability to comply. *Hunt v. Jacobson*, 178 Misc. 201, 33 N. Y. S. (2d) 661.

Where in an action to foreclose a mortgage defendant in military service was only a nominal party, having merely a one-sixth interest in a mortgage which, if still unpaid, was nevertheless subordinate to the mortgage being foreclosed, no personal judgment was sought against said defendant, and defendant had no equity of redemption or other claim or interest arising out of the mortgage being foreclosed, judgment for plaintiff would be rendered notwithstanding military service of said defendant. *Hunt v. Jacobson*, 178 Misc. 201, 33 N. Y. S. (2d) 661.

Under the facts of the case, an unconditional stay order in action to foreclose mortgage would not be granted, but stay would be granted on condition that defendants pay a sum to be applied to the payment of current taxes, the balance, if any, to be applied on account of tax arrears. *Nassau Sav. & Loan Assn. v. Ormond*, 179 Misc. 447, 39 N. Y. S. (2d) 92.

In view of rental received from upper apartment of \$45 per month, it was fair to require the payment of \$35 per month as a condition for granting a stay in an action to foreclose a mortgage on the premises, said sum to be first applied to the payment of taxes and the balance to the payment of interest. *Railroad Fed. Sav. & Loan Assn. v. Morrison*, 179 Misc. 893, 40 N. Y. S. (2d) 319.

Motion to stay foreclosure was granted on condition that defendant pay taxes and interest on unpaid balance of mortgage. *Cortland Sav. Bank v. Ivory*, — Misc. —, 27 N. Y. S. (2d) 318.

The provision for stay of mortgage foreclosure proceedings does not contemplate complete immunity. *O'Leary v. Horgan*, — Misc. —, 39 N. Y. S. (2d) 555.

Stay of foreclosure proceedings was granted with a provision permitting examination of soldier's wife not more than once every year as to the financial ability of defendants and the occupancy of the premises, or in lieu thereof, the furnishing by her of a verified statement in respect to these matters. *O'Leary v. Horgan*, — Misc. —, 39 N. Y. S. (2d) 555.

Nuisances.

This statute will not be applied where the person in military service is seeking to prevent the abatement of a condition which has been adjudged a common nuisance. *Cedartown v. Pickett*, 194 Ga. 508, 22 S. E. (2d) 318.

Parties.

One who is a proper party to a proceeding and whose rights or interests may be affected by its determination is entitled to the benefit of this act. In re Adoption of a Minor, — App. D. C. —, 136 Fed. (2d) 790.

Proceedings before 1942 Amendments became Effective.

Texas court of civil appeals could not grant relief where judgment in trial court was rendered before the 1942 amendments to the act became effective, since such amendments were not before the trial court. *Erlback v. Donald* (Tex. Civ. App.), 170 S. W. (2d) 289.

Public Utility Service.

The refusal of a utility company to furnish gas and electricity in the future on credit which reasonably appeared doubtful was not an "eviction" within this act. *Leshner v. Louisville Gas & Elec. Co.* (D. C.-Ky.), 49 Fed. Supp. 88.

Ship Mortgages and Liens.

In libel brought in federal district court in New York to foreclose a mortgage on a vessel, motion to stay sale of the vessel under final decree would not be granted under this act, where it appeared that a stay would cause depreciation in the value of the vessel, that the market for its sale would not be so good later, and that respondent-owner deliberately permitted a default to be taken when he was present in New York and had ample opportunity to confer with proctors in order to prepare a defense. *Sylph* (D. C.-N. Y.), 42 Fed. Supp. 354.

Under this act, the party resisting the application for a stay has the burden

of satisfying the court of the absence of material impairment by military service of defendant's ability to defend himself. *Bowsman v. Peterson* (D. C.-Nebr.), 45 Fed. Supp. 741; *Reynolds v. Haulcroft*, — Ark. —, 170 S. W. (2d) 678.

The language of the act as to the granting of stays is permissive, but it reflects an instructive legislative policy to place the person engaged in the military establishment beyond the effect of the urgencies and uncertainties pending litigation, and to allow him a reasonable period following his discharge to reorient himself with a view to the trial of his cause. *Bowsman v. Peterson* (D. C.-Nebr.), 45 Fed. Supp. 741.

The discretion vested in the trial court concerns the matter of staying of the proceedings and not a dismissal of the cause for the failure of a proper affidavit. *Oliver v. Oliver*, — Ala. —, 12 So. (2d) 852.

This act makes the allowance of a stay mandatory unless, in the opinion of the court, the ability of defendant to conduct his defense is not materially affected by reason of his military service. *Reynolds v. Haulcroft*, — Ark. —, 170 S. W. (2d) 678.

Where the evidence in the record, and particularly the uncontested affidavit of defendant's commanding officer made it clear beyond dispute that the ability of defendant to conduct his defense was materially affected by reason of his military service, it was the duty of the trial court so to find. In re Adoption of a Minor, — App. D. C. —, 136 Fed. (2d) 790.

Judgment staying proceedings, granted ex parte without notice to the opposite party and without affording opposite party an opportunity to be heard, was invalid under the Fourteenth Amendment. *Cedartown v. Pickett*, 194 Ga. 508, 22 S. E. (2d) 318.

Soldier Serving in Army of an Ally.

A defendant enlisted in the military service of the Dominion of Canada, an ally of the United States, is entitled to the same consideration as if he were abroad in the military service of the United States, although this act does not apply to him. *State ex rel. Buck v. McCabe*, 140 Ohio St. 535, 45 N. E. (2d) 763.

Statute of Limitations.

The period spent in military service by a plaintiff in an action shall not be included in any period during which the statute of limitations runs. *Perkins v. Manning*, — Ariz. —, 122 Pac. (2d) 857, 140 A. L. R. 1499.

Stay of Proceedings.

This act can not be construed to require continuance on the mere showing that defendant is in the military service. *Boone v. Lightner*, — U. S. —, 87 L. ed. —, 63 Sup. Ct. 1223, affg. 222 N. Car. 205, 22 S. E. (2d) 426.

Where, in an action against a trustee to compel an accounting, summons and complaint were served on defendant personally, and defendant filed an answer denying jurisdiction of the court and on the merits, and defendant was in the military service stationed in the office of the Under Secretary of War in Washington, the court did not abuse its discretion in denying a continuance under this act. *Boone v. Lightner*, — U. S. —, 87 L. ed. —, 63 Sup. Ct. 1223, affg. 222 N. Car. 205, 22 S. E. (2d) 426.

Person in military service is not entitled to a stay of judgment against him merely by virtue of this act, unless, in the opinion of the court passing on the question, his ability to conduct his defense is materially affected by reason of his military service. *Pope v. United States Fidelity & Guaranty Co.*, 67 Ga. App. 415, 20 S. E. (2d) 618.

Soldier is not entitled to stay of judgment against him where, in the opinion of the court passing on the matter, his ability to comply with the judgment is not materially affected by reason of his military service. *Pope v. United States Fidelity & Guaranty Co.*, 67 Ga. App. 560, 21 S. E. (2d) 289.

In an action to enforce a bank stockholders' liability, order staying all proceedings in the case as to defendants not in military service was not erroneous where the theory of the liability of such defendants was that they were jointly liable as heirs of defendant who was in military service, as against contention of plaintiffs that defendants were guilty of dilatory tactics in the proceedings before the master. *Hellberg v. Warner*, 319 Ill. App. 117, 48 N. E. (2d) 972.

It is only in cases where the rights of the persons in the military service might be prejudiced without their presence to either prosecute the action or conduct their defense that the courts are authorized to stay proceedings. *Charles Tolmas, Inc. v. Streiffer*, 199 La. 25, 5 So. (2d) 372.

This act does not mean that persons able to meet their obligations may set up the act in bar to prevent creditors from pursuing their remedies, but it does mean that soldiers and sailors in the service who are handicapped by reason of their military service, either in making valid defenses to an action or in meeting their financial obligations, shall have the protection of the court to prevent prejudice to their rights by reason

of such service. *Jamaica Sav. Bank v. Bryan*, 175 Misc. 978, 25 N. Y. S. (2d) 17.

Where defendant was a necessary witness to the defense of the action and was presently in military service and stationed in another state, and it seemed unlikely that he could properly defend the action at this time, the court would grant a stay of all proceedings until three months after defendant's termination of military service or until such time as his military service would not materially affect the defense of the action, at which time the plaintiff might apply for vacation of stay. *Korsch v. Lambing*, — Misc. —, 28 N. Y. S. (2d) 167.

Motion by a woman on behalf of her brother to stay an action to foreclose a mortgage on real property owned by the brother on the ground of his induction into military service was authorized by this act. *Brooklyn Trust Co. v. Papa*, — Misc. —, 33 N. Y. S. (2d) 57.

Where property was transferred to petitioner in application for stay of proceedings solely for the purpose of taking advantage of this act, motion to stay proceedings will be denied. *Flushing Sav. Bank v. Hallewell*, — Misc. —, 35 N. Y. S. (2d) 521.

There is nothing in this act which empowers a court to stay an action when defendant nowhere sets forth a legal defense. *Modern Industrial Bank v. Grossman*, — Misc. —, 40 N. Y. S. (2d) 628.

On the question of whether a stay under this act should be granted, the court should, at the outset, visualize the trial and the preparation of it, with a view to determining the effect of the defendant's absence in military service, and it must be ready at any stage of the proceedings to change its decision and grant the stay if good reason therefor appears. *Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, — Wash. (2d series) —, 134 Pac. (2d) 444.

Sureties, Guarantors, or Indorsers.

While this act permits the granting of a stay to sureties, guarantors, indorsers, and others, whether primarily or secondarily subject to the obligation or liability, a stay to such persons should not be granted where the civil rights of the person in military service are not materially affected. *Laperouse v. Eagle Indem. Co.*, 202 La. 686, 12 So. (2d) 680.

The phrase "others subject to the obligation or liability," used in connection with the words preceding it, is broad enough to include all persons besides sureties, guarantors, or indorsers who are not borrowers, but who are nevertheless obligated to pay the debt depending upon a future event which may not occur, namely the default of the bor-

rower. *Modern Industrial Bank v. Zaentz*, 177 Misc. 132, 29 N. Y. S. (2d) 969.

Section 103 (1) of this act in itself makes no distinction between primary and secondary obligors, since, while guarantors and indorsers are subject to a secondary liability, that of sureties is primary. *Modern Industrial Bank v. Zaentz*, 177 Misc. 132, 29 N. Y. S. (2d) 969.

In an action against guarantor of an infant's contract, plaintiff was granted motion for summary judgment although infant was in armed forces. *Refrigeration & Air Conditioning Institute, Inc. v. Bohn*, — Misc. —, 36 N. Y. S. (2d) 69.

A person who, with another, signs joint and several loan contract under the Ohio Small Loan Act (Page's Gen. Code, § 6346-1 et seq.), and who is separately sued thereon and against whom judgment is regularly taken by virtue of a power of attorney, and who thereafter moves the court to stay the collection of such judgment under the provisions of this act upon the ground that his cosignor was the principal debtor and at the time the motion was made was in military service of the United States, and that the defendant signed the contract solely for the purpose of extending

credit to his cosigner and received no part of the loan made under the contract, is, upon proof of such facts, entitled, within the discretion of the court, to such stay, as being in the class of a surety, guarantor or "other person" subject to the obligation. *Akron Auto Finance Co. v. Stonebraker*, 66 Ohio App. 507, 35 N. E. (2d) 585.

Suspension of Payments.

Where petitioner purchased securities and deposited them in escrow as security for payment of the purchase price, his application for suspension of payments on the ground of his induction in the army was premature where at the time of instituting the proceeding none of the purchase-money notes were in default and no notice had been given by respondents of any proposed sale of the securities held in escrow. *In re Roossin*, — Misc. —, 30 N. Y. S. (2d) 9.

Witnesses.

This act does not apply to persons not in the armed forces who merely want to bring soldiers and sailors back to the court to testify as witnesses. *Jones v. State*, — Ark. —, 171 S. W. (2d) 298.

FEDERAL COURT RULES

RULES OF THE SUPREME COURT OF THE UNITED STATES

Rule 2. Attorneys and Counselors.—

1. * * *

2. Not less than two weeks in advance of application for admission, each applicant shall file with the clerk (1) a certificate from the presiding judge or clerk of the proper court showing that he possesses the foregoing qualifications, (2) his personal statement, on the form approved by the court and furnished by the clerk, and (3) two letters or signed statements of members of the bar of this court, not related to the applicant, who are resident practitioners within the State, Territory, District, or Insular Possession (to which the application refers as provided in paragraph 1 of this rule) stating that the applicant is personally known to them, that he possesses all the qualifications required for admission to the bar of this court, that they have examined his personal statement and that they affirm that his personal and professional character and standing are good.

3. * * *

6. An attorney, barrister, or advocate who is qualified to practice in the highest court of any foreign state which extends a like privilege to members of the bar of this Court, may be specially admitted for purposes limited to a particular case. He shall not, however, be authorized to act as attorney of record. In the case of such applicants, the oath shall not be required and there shall be no fee. Such admissions shall be only on motion of a member of the bar of this Court, notice of which signed by such member and reciting all relevant facts shall be filed with the Clerk at least three days prior to the motion. (As amended June 5, 1944; November 18, 1946.)

Rule 12. Jurisdictional statements.—1. * * *

The statement shall show that the nature of the case and the rulings of the court were such as to bring the case within the jurisdictional provisions relied on and shall cite the cases believed to sustain jurisdiction. It shall also include a statement of the grounds upon which it is contended that the questions involved are substantial (*McArthur v. United States*, 315 U. S. 787, 86 L. ed. 1192, 62 S. Ct. 915; *Zucht v. King*, 260 U. S. 174, 176, 177, 67 L. ed. 194, 198, 43 S. Ct. 24).

If the appeal is from a state court the statements shall in addition specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears, (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of error) as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court. The provisions of this paragraph, with appropriate record page references, must be complied with when review of a state court judgment is sought by petition for writ of certiorari. (See Rule 38, par. 2.) [As amended Apr. 6, 1942.]

* * *

Rule 32. Costs.—* * *

7. In pursuance of the Act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk for this court the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, twenty-five dollars.

For entering an appearance, twenty-five cents.
For entering a continuance, twenty-five cents.
For filing a motion, order, or other paper, twenty-five cents.
For entering any rule or for making or copying any record or other paper, twenty cents per folio of each one hundred words.
For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.
For every search of the records of the court, one dollar.
For a certificate and seal, two dollars.
For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept and paid.
For an admission to the bar and certificate under seal, including filing of preliminary certificate and statements, twenty-five dollars.

For preparing the record or a transcript thereof for the printer, in all cases, including records presented with petitions for certiorari, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio of each one hundred words; but where the necessary printed copies of the record as printed for the use of the court below are furnished, charges under this item will be limited to any additions printed here under the clerk's supervision.

For making a manuscript copy of the record, when required under Rule 13, fifteen cents per folio of each one hundred words, but nothing in addition for supervising the printing.

For preparing, on filing, for the printer, petitions for writs of certiorari, briefs, jurisdictional statements or motions when required by the Rules, or at the request of counsel when, in the opinion of the clerk, circumstances require, indexing the same, changing record references to conform to the pagination of the printed record, and supervising the printing, five dollars for each such petition, brief, jurisdictional statement or motion. Neither the expense of printing nor the clerk's supervising fee shall be allowed as costs in the case.

For a mandate or other process, ten dollars.

For an order on petition for writ of certiorari, five dollars.

For filing briefs, ten dollars for each party appearing.

For every printed copy of any opinion of the court or any justice thereof, certified under seal, two dollars. [As amended Feb. 11, 1943.]

Note.

The amendment to this rule applies to all cases docketed on or after Feb. 15, 1943 and to all admissions to the bar on or after Mar. 2, 1943.

Rule 33. Rehearing.—1. Of judgments or decisions other than those denying or granting certiorari. A petition for rehearing may be filed with the clerk, in term time or in vacation, when accompanied by proof of service on the adverse party, within fifteen days after judgment or decision, unless the time is shortened or enlarged by the court, or a justice thereof. Such petition must be printed and forty copies thereof furnished. It must briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, and will not be granted, unless a justice who concurred in the judgment or decision desires it, and a majority of the court so determines.

(a) A response, if printed and forty copies thereof furnished, accompanied by proof of service, may be filed with the clerk within ten days after service of petition, unless the time is shortened or enlarged by the court, or a justice thereof. Such response is not required, and the court will not delay its action upon a petition for rehearing to await a response thereto, unless a response is requested by the court.

2. Of orders on petitions for writs of certiorari. A petition for rehearing may be filed with the clerk in term time or in vacation, subject to the requirements respecting time, service, printing and number of copies furnished as provided in paragraph 1 of this rule. Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect (e. g., *Sanitary Refrigerator Co. v. Winters*, 280US30, 34, footnote 1; *Massey v. United States*, 291US608), or to other substantial grounds available to petitioner although not previously presented (e. g., *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305US47, 50). Such petition is not subject to oral argument. A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for de-

lay, and counsel must also certify that the petition is restricted to the grounds above specified.

(a) A response, if printed and forty copies thereof furnished, accompanied by proof of service, may be filed with the clerk within ten days after service of petition, unless the time is shortened or enlarged by the court, or a justice thereof. (As amended Oct. 13, 1947, effective Jan. 1, 1948.)

Rule 36. Appeals; by whom allowed; supersedeas.—1. An appeal will be out of time unless, within the period fixed by statute, application for allowance is presented to the judge or justice who allows it. A prior timely application to another judge or justice does not extend the statutory period. See *Matton Steamboat Co. v. Murphy*, 319 U. S. —, 63 S. Ct. 1126, 87 L. ed. —. * * * [As amended June 7, 1943.]

2. Supersedeas bonds must be taken, with good and sufficient security, that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must before the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal, unless, after notice and hearing and for good cause shown, the judge or justice allowing the appeal fixes a different amount or orders security other than the bond; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in the case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal. [As amended Oct. 21, 1940.]

Rule 38. Review on writ of certiorari of decisions of State Courts, Circuit Courts of Appeals, and the United States Court of Appeals for the District of Columbia.

—1. * * *

3. Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof), and due proof of service shall be filed with the clerk. If the United States, or an officer or agency thereof, is respondent, the service of the petition, record, and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof), after notice, within which to file forty printed copies of an opposing brief, conforming to Rules 26 and 27. The brief must bear the name of a member of the bar of this court at the time of filing.

4. * * * (As amended May 17, 1948.)

Rule 38½. State criminal cases—Time for taking appeal or filing petition for writ of certiorari.—An appeal taken, or petition for writ of certiorari filed, seeking review of a judgment of a state court of last resort in a criminal case, shall be taken or filed within the ninety days prescribed in 28 United States Code Annotated, section 2101(c), Approved June 25, 1948.

So far as applicable, the general considerations and provisions of Rules 36 and 38 will control in respect to an appeal taken or petition for writ of certiorari filed in a criminal case from a state court of last resort. (As added Nov. 15, 1948.)

Rule 41. Judgments of Court of Claims; petitions for review on certiorari.

—1. * * *

2. Within thirty days after the petition, brief, and record are served (unless enlarged by the court or a justice thereof) the respondent may file with the clerk forty printed copies of an opposing brief, conforming to Rules 26 and 27. Upon the expiration of that period, or upon an express waiver of the right to file or the actual filing of such brief in a shorter time, the petition, briefs, and record shall be distributed by the clerk to the court for its consideration (See Rule 38, par. 4(a).)

3. * * * (As amended May 17, 1948.)

RULES OF CIVIL PROCEDURE FOR UNITED STATES

I. SCOPE OF RULES—ONE FORM OF ACTION

1. **Scope of Rules.**—These rules govern the procedure in United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action. (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The amendment did nothing more than change the words "district courts of the United States" to read, "United States district courts." This change in nomenclature conforms to the official designation of district courts in Title 28, U. S. C., § 132(a), 1948 revision.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS

Rule 6. Time.—(a) * * *

(b) **Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) * * * (As amended December 27, 1946.)

Rule 7. Pleadings allowed; forms of motions.—(a) **Pleadings.** There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(b) * * * (As amended December 27, 1946; eff. date, see Rule 86.)

Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleadings.—(a) **When presented.** A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4(e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United

States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion; (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)—(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) Waiver of defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of

any evidence that may have been received. (As amended December 27, 1946; eff. date, see Rule 86.)

Rule 13. Counterclaim and cross-claim.—(a) Compulsory counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it rises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

(b) * * *

(g) Cross-claim against co-party. A pleading may state as a cross-claim any claim by one party against co-party rising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) Additional parties may be brought in. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

(i) Separate trials; separate judgment. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54 (b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of. (As amended December 27, 1946; eff. date, see Rule 86.)

Rule 14. Third-party practice.—(a) When defendant may bring in third party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against the other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or concurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(b) When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so. (As amended December 27, 1946; eff. date, see Rule 86.)

III. PLEADINGS AND MOTIONS

Rule 16. Pre-trial procedure; formulating issues.

Note.

This rule was made applicable to proceedings in admiralty by Rules in Admiralty, No. 44½.

IV. PARTIES

Rule 17. Parties plaintiff and defendant; capacity.—(a) * * *

(b) Capacity to sue or be sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the

law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C. §§ 754, 959(a).

(c) * * * (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The amendment of Dec. 29, 1948, merely struck out "Rule 66" and inserted "Title 28, U. S. C. §§ 754, 959(a)".

Since the statute states the capacity of a federal receiver to sue or be sued, a repetitive statement in the rule was confusing and undesirable.

Rule 18. Joinder of claims and remedies.—(a) Joinder of claims. The plaintiff in his complaint or in a counterclaim and the defendant in an answer setting forth a counter-claim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) * * * (As amended Dec. 27, 1946; eff. date see Rule 86.)

Rule 22. Interpleader.—(1) * * *

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U. S. C. §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. (As amended Dec. 29, 1948; eff. date see Rule 86.)

Explanatory note. The amendment substitutes the present statutory reference, i. e., 28 U. S. C. §§ 1335, 1397, and 2361, for "Section 24, (26) of the Judicial Code, as amended, U. S. C., Title 28, § 41 (26)".

Rule 24. Intervention.—(a) Intervention of right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

(b) Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C., § 2403. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date see Rule 86.)

Explanatory note. The amendment of Dec. 29, 1948 substitutes the present statutory reference, i. e., Title 28, U. S. C. § 2403, for Act of August 24, 1937, C. 754, § 1.

Rule 25. Substitution of parties.—(a) * * *

(d) Public officers; Death or separation from Office. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. (As amended Dec. 29, 1948; eff. date see Rule 86.)

Explanatory note. The words "the Act of February 13, 1925, 43 Stat. 941, U. S. C. Title 28, § 180," were deleted from the text because said act was repealed and not included in revised Title 28, for the reason that it was "Superseceded by Rules 25 and 81 of the Federal Rules of Civil Procedure." See Report from the Committee on the Judiciary House of Representatives to Accompany H. R. 3214, House Rep. 308 (80th Cong., 1st Sess.) p. A239. Those officers which that Act specified but which were not enumerated in Rule 25(d), namely, officers of "the Canal Zone, or of a Territory or an insular possession of the United States, . . . or other governmental agency of such Territory or insular possession," should now be specifically enumerated in the rule and the amendment so provides.

V. DEPOSITIONS AND DISCOVERY

Rule 26. Depositions pending action.—(a) When depositions may be taken. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Scope of examination. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) * * * (As amended Dec. 27, 1946; eff. date see Rule 86.)

Rule 27. Depositions before action or pending appeal.—(a) Before action.

(1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the

testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to make the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service can not with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court in accordance with the provisions of Rule 26(d).

(b) Pending appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by action. This rule does not limit the power of a court to entertain an action to perpetuate testimony. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The amendment of Dec. 29, 1948 did nothing more than change the words "district courts of the United States" where they appeared in (a) paragraphs 1 and 4, to read, "United States district courts." This change in nomenclature conforms to the official designation of district courts in Title 28, U. S. C. § 132(a), 1948 revision.

Rule 28. Persons before whom depositions may be taken.—(a) Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

(b) * * * (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 33. Interrogatories to parties.—Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 34. Discovery and production of documents and things for inspection, copying, or photographing.—Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26 (b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 36. Admission of facts and of genuineness of documents.—(a) Request for admission. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and

when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) Effect of admission. Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 37. Refusal to Make Discovery: Consequences.—(a) * * *

(e) Failure to Respond to Letters Rogatory. A subpoena may be issued as provided in Title 28, U. S. C., § 1783, under the circumstances and conditions therein stated.

(f) * * * (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The amendment substitutes the present statutory reference, i. e., Title 28, U. S. C., § 1783, "for Act of July 3, 1926, C. 762, § 1, (44 Stat. 835), U. S. C. Title 28, § 711."

VI. TRIALS

Rule 41. Dismissal of action.—(a) Voluntary dismissal; effect thereof. (1) By Plaintiff; By Stipulation. Subject to the provisions of Rule 23 (c), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

(c) * * * (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 45. Subpoena.—(a) * * *

(b) For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) * * *

(d) Subpoena for taking depositions; place of examination. (1) Proof of service of a notice to take a deposition as provided in Rules 30(a) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or trial.

(1) * * *

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C., § 1783. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date see, Rule 86.)

Explanatory note. The amendment of Dec. 29, 1948 substitutes the present statutory reference, i. e., Title 28, U. S. C., § 1783, for "the Act of July 3, 1926, C. 762, §§ 1, 3 (44 Stat. 835, U. S. C., Title 28, § 713)."

Rule 52. Findings by the court.—(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

(b) * * * (As amended Dec. 27, 1946; eff. date, see Rule 86.)

VII. JUDGMENTS

Rule 54. Judgments; costs.—(a) * * *

(b) Judgment upon multiple claims. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(c) * * * (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 56. Summary judgment.—(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the

action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) * * * (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 57. Declaratory judgments.—The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C., § 2201, shall be in accordance with those rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The amendment substitutes the present statutory reference, i. e., Title 28, U. S. C., § 2201, for "section 274(d) of the Judicial Code, as amended, U. S. C., Title 28, § 400."

Rule 58. Entry of judgment.—Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 59. New trials; amendment of judgments.—(a) * * *

(b) Time for motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) * * *

(e) Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 60. Relief from judgment or order.—(a) Clerical mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertance; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time

to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, § 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment substitutes the present statutory reference, i. e., Title 28, U. S. C., § 1655.

Rule 62. Stay of proceedings to enforce a judgment.—(a) * * *

(b) Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(c) * * *

(g) Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

(h) Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment of (g) deleted the words, "and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."

Section 210 of the Judicial Code, as amended, U. S. C., Title 28, § 47a, was repealed by revised Title 28 and its provisions that stays pending appeals to the Supreme Court in Interstate Commerce Commission cases may be granted only by that court or a justice thereof are not included in revised Title 28. Prior to this repeal the additional general reference in subdivision (g) to "other statutes of the United States", was needed as a safety residual provision due to the specific reference to Section 210 of the Judicial Code.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 65. Injunctions.—(a) * * *

(c) Security. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his

agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) * * *

(e) Employer and employee; interpleader; constitutional cases. These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U. S. C., § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; Title 28, U. S. C., § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. Specific enumeration of statutes dealing with labor injunctions in (e) prior to its amendment in 1948, were deemed undesirable due to the enactment of amendatory or new legislation from time to time. The committee considered that the more general and inclusive reference, "any statute of the United States", did not change the intent of subdivision (e) of Rule 65, and that the subdivision would have continuing applicability without the need of subsequent readjustment to labor legislation.

The 1948 amendment relative to actions of interpleader or in the nature of interpleader substitutes the present statutory reference for section 24(26) of the Judicial Code as amended, U. S. C., and will embrace any future amendment to statutory interpleader provided for in Title 28, U. S. C., § 2361.

The reference to Act of August 24, 1937, C. 754, § 3, deleted from the rule and which provided for a district court of three judges to hear and determine an action to enjoin the enforcement of any Act of Congress for repugnance to the Constitution of the United States. The provisions of that Act dealing with the procedure for the issuance of temporary restraining orders and interlocutory and final injunctions have been included in revised Title 28, U. S. C., § 2284, which, however, has been broadened to apply to all actions required to be heard and determined by a district court of three judges. The amendatory saving clause of subdivision (e) of Rule 65 has been broadened accordingly.

Rule 66. Receivers appointed by federal courts.—An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment deleted what was the second sentence and which read: "A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States."

This was done for the reason that Title 28, U. S. C., §§ 754 and 959(a), state the capacity of a federal receiver to sue or be sued in a federal court, and a repetitive statement of the statute in Rule 66 was considered confusing and undesirable. See also Note to Rule 17(b), *supra*.

Rule 67. Deposit in court. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U. S. C., §§ 2041, and 2042; the Act of June 26, 1934, c. 756, § 23, as amended, (48 Stat. 1236, 58 Stat. 845), U. S. C., Title 31, § 725v; or any like statute. (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment substituted "Title 28, U. S. C., §§ 2041, and 2042", for "sections 995 and 996, Revised Statutes as amended, U. S. C., Title 28, §§ 851, 852."

Since the Act of June 26, 1934 had been amended by Act of Dec. 21, 1944, 58 Stat. 845, correcting references were made.

Rule 68. Offer of judgment.—At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 69. Execution.—(a) * * *

(b) Against certain public officers. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U. S. C., § 2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c. 130, § 8 (18 Stat. 401), U. S. C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes. (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment substituted the present statutory references for those to the old code prior to the 1948 revision.

IX. APPEALS

Rule 72. Appeal from a District Court to the Supreme Court. When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken, perfected, and prosecuted pursuant to law and the Rules of the Supreme Court of the United States governing such an appeal. (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment deleted the words "by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by," which followed the word "taken" and preceded the word "perfected."

This was done for the reason that Title 28, U. S. C., § 1252, seems to contemplate that the direct appeal therein provided for is to be taken by notice of appeal. Aside from (1) § 1252, *supra*, (2) provisions stating when, and within what time, a direct appeal may be taken from a district court to the Supreme Court (see §§ 1252, 1253, 2281, 2282, and 2101), and (3) the provision in § 2101(a) that as to the direct appeals provided for in §§ 1252, 1253, and 2282 the "record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court", Title 28 does not set forth the procedure for perfecting a direct appeal. The procedure for perfecting the appeal will, therefore, as in the past be largely governed by Rules of the Supreme Court. It seems advisable that Rule 72 accordingly be stated in terms of general reference, rather than incorporating specific references to Rules of the Supreme Court (such as the petition for appeal, assignment of errors, citation) that may not be consistent with revised Title 28 and may, in any event, be changed by the Supreme Court's amendment of its Rules.

Rule 73. Appeal to court of appeals.—(a) When and how taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pur-

suant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(b) * * *

(c) Bond on appeal. Unless a party is exempted by law, a bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

(g) Docketing and record on appeal. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the appeal there docketed within 40 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment of (a) made no change other than to delete the word "circuit" in order to make it conform to the official designation of the court as designated in U. S. C. Title 28, § 43(a).

Subdivision (c) R. S. § 1000, Title 28, U. S. C., § 869 (1946), which provided for cost bonds, is repealed and its provisions are not included in revised Title 28. Since the Revisers thought that this should be controlled by rule of court as in the case of supersedeas bond, see subdivision (d), no amendment to Title 28 will be proposed to restore the omission. The requirement of a cost bond should, therefore, be incorporated in the rule, and the amendment so provides. The exemptions referred to are set forth in Title 28, U. S. C., §§ 1915, 1916, and 2408.

Rule 74. Joint or several appeals to the Supreme Court or to court of appeals; summons and severance abolished. (Aside from the title, the rules remains unchanged.) (As amended Dec. 29, 1948; eff. date, see Rule 86.)

Rule 75. Record on appeal to a court of appeals.—(a) Designation of contents of record on appeal. Promptly after an appeal to a court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days after the service and filing of such a designation, any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

(b) Transcript. If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence of proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. The copy so filed by the appellant shall be available for the use of the other parties. In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy. When the rules of the court of appeals so require, the appellant shall furnish a second copy of the transcript for use in the appellate court.

(c) Form of testimony. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) Statement of points. No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(e) Record to be abbreviated. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) Stipulation as to record. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) Record to be prepared by clerk—necessary parts. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following; the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof when a copy is required by the rules of the court of appeals. The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not require an additional copy as a requisite to certification.

(h) Power of court to correct or modify record. It is not necessary for the record on appeal to be approved by the district court or judge thereof except as provided in subdivisions (m) and (n) of this rule and in Rule 76, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. All other questions as to the content and form of the record shall be presented to the court of appeals.

(i) Order as to original papers or exhibits. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) Record for preliminary hearing in appellate court. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) Several appeals. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) Printing. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the court of appeals shall conform to the Rules of the Supreme Court relating to records on appeals to that court.

(m) Appeals in forma pauperis. Upon leave to proceed in forma pauperis, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court.

(n) Appeals when no stenographic report was made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court of settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

(o) Rule for transmission of original papers. Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73 (g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. No change was made in this rule by the 1948 amendment other than to delete the word "Circuit" in the title, and the word "circuit" in subdivisions (a), (b), (g), (h), (l), and (o) conform to the official designation of a court of appeals in Title 28, U. S. C., § 43(a).

Rule 76. Record on appeal to a court of appeals; agreed statement.

Explanatory note. The 1948 amendment deleted the word "Circuit" in the title, and the word "circuit" in the first sentence to make the rule conform to the official designation of a court of appeals in Title 28, U. S. C., § 43(a). No other changes were made.

X. DISTRICT COURTS AND CLERKS

Rule 77. District courts and clerks.—

(a) * * *

(d) Notice of orders or judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a). (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 79. Books and records kept by the clerk and entries therein.—(a) Civil docket. The clerk shall keep a book known as "civil dockets" of such form and style as may be prescribed by the Director of Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) Civil judgments and orders. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States may prescribe, a correct copy of every final judgment or appealable order, or order affecting title to or lien upon real or personal property, and any other order which the court may direct to be kept.

(c) Indices; calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(d) Other books and records of the clerk. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The only change made in this rule by the 1948 amendment was to strike out the words "Senior Circuit Judges" wherever they appear and insert in lieu thereof the words "the United States," in order to conform to the official designation in U. S. C. Title 28, § 231.

Rule 80. Stenographer; stenographic report or transcript as evidence.—(a) Stenographer. (Abrogated.)

(b) Official stenographer. (Abrogated.)

(c) Stenographic report or transcript as evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

XI. GENERAL PROVISIONS

Rule 81. Applicability in general.—(a) To what proceedings applicable. (1) These rules do not apply to proceedings in admiralty. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U. S. C., except in so

far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the United States District Court for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity; admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. The requirements of Title 28, U. S. C., § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

(3) In proceedings under Title 9, U. S. C., relating to arbitration, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, Title 7, § 499g (c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribe by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), Title 15, § 715d (c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(5) These rules do not alter the practice in the United States district courts prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), as amended Title 29, §§ 159 and 160 for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respect not covered by those statutes, the practice in the district courts shall conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of October 14, 1940, c. 876, § 338, (54 Stat. 1158), U. S. C., Title 8, § 738, remain in effect.

(7) In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable.

(b) * * *

(c) Removed actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition.

(d) District of Columbia; courts and judges. (Abrogated.)

(e) Law applicable. Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the United States District Court for the District of Columbia. When the word "state" is used, it includes, if appropriate, the District of

Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceeding in the United States District Court for the District of Columbia, any Act of Congress locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" includes the statutes of that state and the state judicial decisions construing them.

(f) References to officer of the United States. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a collector of internal revenue, a former collector of internal revenue, or the personal representative of a deceased collector of internal revenue. (As amended Dec. 27, 1946; Dec. 29, 1948; eff. date, see Rule 86.)

Explanatory note. The 1948 amendment of subdivision (a) changed statutory references to conform to the revision and enactment into positive law of Titles 9, 17, and 28 of the United States Code, amendments of Acts March 4, 1927 and July 5, 1935, the repeal of Act Sept. 13, 1888, c. 1015, 25 Stat. 479 (Chinese Exclusion Act), and the repeal of Act June 29, 1906 and replacement by the Nationality Act of Oct. 14, 1940. Changes in nomenclature were made to reflect changes made by the 1948 revision of Title 28 of the United States Code.

In subdivision (c), changes were made in nomenclature to conform to the official designation of district courts in Title 28, U. S. C., § 132(a). Revision of the third sentence was occasioned by the procedure for removal set forth in revised Title 28, U. S. C., § 1446. Under the prior removal procedure governing civil actions, 28 U. S. C., § 72 (1946), the petition for removal had to be first presented to and filed with the state court, except in the case of removal on the basis of prejudice or local influence, within the time allowed "to answer or plead to the declaration or complaint of the plaintiff"; and the defendant had to file a transcript of the record in the federal court within thirty days from the date of filing his removal petition. Under § 1446(a) removal is effected by a defendant filing with the proper United States district court "a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action." And § 1446(b) provides: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." This subsection (b) gives trouble in states where an action may be both commenced and service of process made without serving or otherwise giving the defendant a copy of the complaint or other initial pleading. To cure this statutory defect, the Judge's Committee appointed pursuant to action of the Judicial Conference and headed by Judge Albert B. Maris is proposing an amendment to § 1446(b). The revised third sentence of Rule 81(c) is geared to this proposed statutory amendment; and it gives the defendant at least 5 days after removal within which to present his defenses. The phrase, "or within 20 days after the service of summons upon such initial pleading, then filed," was inserted because in several states suit is commenced by service of summons upon the defendant, notifying him that the plaintiff's pleading has been filed with the clerk of the court and is intended to give the defendant 20 days after the service of such summons in which to answer in a removed action, or 5 days after the filing of the petition for removal, whichever is longer. In these states, the 20 day period does not begin to run until such pleading is actually filed.

The change in the last sentence of subdivision (c) reflects the fact that a transcript of the record is no longer required under § 1446, and safeguards the right to demand a jury trial. The phrase, "and who has not already waived his right to such trial", which previously appeared in the fourth sentence was deleted in order to afford a party who has waived his right to trial by jury in a state court an opportunity to assert that right upon removal to a federal court. Only rarely will the last sentence of Rule 81(c) have any applicability, since removal will normally occur before the pleadings are closed, and in this usual situation Rule 38(b) applies and safeguards the right to jury trial.

Subdivision (d) was abrogated because it is obsolete and unnecessary under Title 28, U. S. C., §§ 88, 132, 133.

In subdivision (e) changes in nomenclature were made to conform to the official designation of the United District Court for the District of Columbia in Title 28, U. S. C., §§ 132(a), 88.

Rule 82. Jurisdiction and Venue Unaffected.

Explanatory note. Amendment of December 29, 1948, did nothing more than change the words "district courts of the United States" to read, "United States

RULES OF CIVIL PROCEDURE

district courts." This change in nomenclature conforms to the official designation of district courts in Title 28, U. S. C., § 132(a), 1948 revision.

Rule 84. Forms.—The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. (As amended Dec. 27, 1946; eff. date, see Rule 86.)

Rule 86. Effective date.—(a) These rules will take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules will take effect on September 1, 1938. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

(b) Effective date of amendments. The amendments adopted by the Supreme Court on December 27, 1946, and transmitted to the Attorney General on January 2, 1947, shall take effect on the day which is three months subsequent to the adjournment of the first regular session of the 80th Congress, but, if that day is prior to September 1, 1947, then these amendments shall take effect on September 1, 1947. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice in which event the former procedure applies.

(c) Effective date of amendments. The amendments adopted by the Supreme Court on December 29, 1948, and transmitted to the Attorney General on December 31, 1948, shall take effect on the day following the adjournment of the first regular session of the 81st Congress. (As amended Dec. 27, 1946; Dec. 29, 1948.)

Explanatory note. The 1948 amendment added (c).

By making the general amendments effective on the day following the adjournment of the first regular session of Congress to which they are transmitted, subdivision (c), *supra*, departs slightly from the prior practice of making amendments effective on the day which is three months subsequent to the adjournment of Congress or on September 1 of that year, whichever day is later. The reason for this departure is that no added period of time is needed for the Bench and Bar to acquaint themselves with the general amendments, which effect a change in nomenclature to conform to revised Title 28, substitute present statutory references to this Title and cure the omission or defect occasioned by the statutory revision in relation to the substitution of public officers, to a cost bond on appeal, and to procedure after removal (see Rules 25(d), 73(c), 81(c)).

RULES OF CRIMINAL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS

Effective March 21, 1946, with amendments to December 27, 1948

I. Scope, Purpose and Construction.

- Rule 1. Scope.
- Rule 2. Purpose and construction.

II. Preliminary Proceedings.

- Rule 3. The complaint.
- Rule 4. Warrant or summons upon complaint.
- Rule 5. Proceedings before the commissioner.

III. Indictment and Information.

- Rule 6. The grand jury.
- Rule 7. The indictment and the information.
- Rule 8. Joinder of offenses and of defendants.
- Rule 9. Warrant or summons upon indictment or information.

IV. Arraignment, and Preparation for Trial.

- Rule 10. Arraignment.
- Rule 11. Pleas.
- Rule 12. Pleadings and motions before trial; defenses and objections.
- Rule 13. Trial together of indictments or informations.
- Rule 14. Relief from prejudicial joinder.
- Rule 15. Depositions.
- Rule 16. Discovery and inspection.
- Rule 17. Subpoena.

V. Venue.

- Rule 18. District and division.
- Rule 19. Transfer within the district.
- Rule 20. Transfer from the district for plea and sentence.
- Rule 21. Transfer from the district or division for trial.
- Rule 22. Time of motion to transfer.

VI. Trial.

- Rule 23. Trial by jury or by the court.
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I. SCOPE, PURPOSE, AND CONSTRUCTION

Rule 1. Scope.—These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

NOTES TO DECISIONS

Liberal construction.

"These rules should be construed with the greatest liberality." U. S. v. Cancellieri, (DC-NY), 5 FedRDec 313.

Force and effect.

Since the rules of criminal procedure were enacted by congress they have been placed in the sphere of legislation transcending a mere rule of court. United States v. Janitz, (DC-NJ) 6 FRD 1.

Rule 2. Purpose and construction.—These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

II. PRELIMINARY PROCEEDINGS

Rule 3. The complaint.—The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or summons upon complaint.—(a) **Issuance.**—If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) **Form.**—(1) **Warrant.**—The warrant shall be signed by the commissioner and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that the defendant be arrested and brought before the nearest available commissioner.

(2) Summons.—The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before a commissioner at a stated time and place.

(c) Execution or service; and return.—(1) By whom.—The warrant shall be executed by a marshal or by some other officer authorized by law. The summons may be served by any person authorized to serve a summons in a civil action.

(2) Territorial limits.—The warrant may be executed or the summons may be served at any place within the jurisdiction of the United States.

(3) Manner.—The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

(4) Return.—The officer executing a warrant shall make return thereof to the commissioner or other officer before whom the defendant is brought pursuant to Rule 5. At the request of the attorney for the government any unexecuted warrant shall be returned to the commissioner by whom it was issued and shall be cancelled by him. On or before the return day the person to whom a summons was delivered for service shall make return thereof to the commissioner before whom the summons is returnable. At the request of the attorney for the government made at any time while the complaint is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the commissioner to the marshal or other authorized person for execution or service.

Cross reference.

Service on corporations, see Rule 9(c).

Rule 5. Proceedings before the commissioner.—(a) Appearance before the commissioner.—An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) Statement by the commissioner.—The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) Preliminary examination.—The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

Cross reference.

Right to bail, see Rule 46.

III. INDICTMENT AND INFORMATION

Rule 6. The grand jury.—(a) Summoning grand juries.—The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 mem-

bers. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(b) Objections to grand jury and to grand juries.—(1) Challenges.—The attorney for the government or a defendant who has been held to answer in the district court may challenge the array of jurors on the ground that the grand jury was not selected, drawn or summoned in accordance with law, and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges shall be made before the administration of the oath to the jurors and shall be tried by the court.

(2) Motion to dismiss.—A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) Foreman and deputy foreman.—The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who may be present.—Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Secrecy of proceedings and disclosure.—Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) Finding and return of indictment. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant has been held to answer and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

(g) Discharge and excuse. A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may excuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused.

Rule 7. The indictment and the information.—(a) Use of indictment or information.—An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts considering the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of particulars.—The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 8. Joinder of offenses and of defendants.—(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 9. Warrant or summons upon indictment or information.—(a) Issuance.—Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. The clerk shall issue a summons instead of a warrant upon the request of the attorney for the government or by direction of the court. Upon like request or direction he shall issue more than one warrant or summons for the same defendant. He shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) Form. (1) Warrant. The form of the warrant shall be as provided in Rule 4(b) (1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place.

(c) Execution or service; and return. (1) Execution or service. The warrant shall be executed or the summons served as provided in Rule 4(c) (1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or, for the purpose of admission to bail, before a commissioner.

(2) Return. The officer executing a warrant shall make return thereof to the court. At the request of the attorney for the government any unexecuted

warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

IV. ARRAIGNMENT, AND PREPARATION FOR TRIAL

Rule 10. Arraignment.—Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

Rule 11. Pleas.—A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

Rule 12. Pleadings and motions before trial; defenses and objections.—(a) Pleadings and motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) The motion raising defenses and objections. (1) Defenses and objections which may be raised. Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) Defenses and objections which must be raised. Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) Time of making motion. The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) Hearing on motion. A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) Effect of determination. If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations.

Rule 13. Trial together of indictments or informations.—The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

Rule 14. Relief from prejudicial joinder.—If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 15. Depositions.—(a) When taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) Notice of taking. The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) Defendant's counsel and payment of expenses. If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) How taken. A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) Use. At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) Objections to admissibility.—Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

Rule 16. Discovery and inspection.—Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

Rule 17. Subpoena.—(a) For attendance of witnesses; form; issuance. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. A subpoena shall be issued by a commissioner in a proceeding before him, but it need not be under the seal of the court.

(b) Indigent defendants. The court or a judge thereof may order at any time that a subpoena be issued upon motion or request of an indigent defendant. The

motion or request shall be supported by affidavit in which the defendant shall state the name and address of each witness and the testimony which he is expected by the defendant to give if subpoenaed, and shall show that the evidence of the witness is material to the defense, that the defendant cannot safely go to trial without the witness and that the defendant does not have sufficient means and is actually unable to pay the fees of the witness. If the court or judge orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the government.

(c) For production of documentary evidence and of objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

(d) Service. A subpoena may be served by the marshal, by his deputy or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for 1 day's attendance and the mileage allowed by law.

(e) Place of service. (1) In United States. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

(2) Abroad. A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in Title 28, U. S. C., § 1783.

(f) For taking deposition; place of examination. (1) Issuance. An order to take a deposition authorizes the issuance by the clerk of the court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein.

(2) Place. A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the district may be required to attend only in the country where he is served with a subpoena or within 40 miles from the place of service or at such other place as is fixed by the court.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

V. VENUE

Rule 18. District and division.—Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed, but if the district consists of two or more divisions the trial shall be had in a division in which the offense was committed.

Rule 19. Transfer within the district.—In a district consisting of two or more divisions the arraignment may be had, a plea entered, the trial conducted or sentence imposed, if the defendant consents, in any division and at any time.

Rule 20. Transfer from the district for plea and sentence.—A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or nolo contendere, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution

shall continue in that district. If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceeding shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made.

Rule 21. Transfer from the district or division for trial.—(a) For prejudice in the district or division. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division.

(b) Offense committed in two or more districts or divisions. The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.

(c) Proceedings on transfer. When a transfer is ordered the clerk shall transmit to the clerk of the court to which the proceeding is transferred all papers in the proceeding or duplicates thereof and any bail taken, and the prosecution shall continue in that district or division.

Rule 22. Time of motion to transfer.—A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe.

VI. TRIAL

Rule 23. Trial by jury or by the court.—(a) Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

(b) Jury of less than twelve. Juries shall be of 12 but at any time before verdict the parties may stipulate in writing with the approval of the court that the jury shall consist of any number less than 12.

(c) Trial without a jury. In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specially.

Rule 24. Trial jurors.—(a) Examination. The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.

(b) Peremptory challenges.—If the offense charged is punishable by death, each side is entitled to 20 peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, the government is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year or by fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate jurors. The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremp-

tory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Rule 25. Judge; disability.—If by reason of absence from the district, death sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

Rule 26. Evidence.—In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 27. Proof of official record.—An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions.

Rule 28. Expert witnesses.—The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

Rule 29. Motion for acquittal.—(a) Motion for judgment of acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

(b) Reservation of decision on motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal.

Rule 30. Instructions.—At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 31. Verdict.—(a) Return. The verdict shall be unanimous. It shall be returned by the jury to the judge in open court.

(b) Several defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

(c) Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(d) Poll of jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

VII. JUDGMENT

Rule 32. Sentence and judgment.—(a) Sentence. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) Judgment. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) Presentence investigation. (1) When made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition, and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law.

Explanatory note.—Rules 32 to 39 were promulgated by the Supreme Court on February 8, 1946.

Rule 33. New Trial.—The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

Rule 34. Arrest of judgment.—The court shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 5 days after determination of guilt or within such further time as the court may fix during the 5-day period.

Rule 35. Correction or reduction of sentence.—The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of

Rule 36. Clerical mistakes.—Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

VIII. APPEAL

Rule 37. Taking appeal; and petition for writ of certiorari.—(a) Taking appeal. (1) Notice of appeal. An appeal permitted by law from a district court to the Supreme Court or to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. If the appeal is directly to the Supreme Court, the notice shall be accompanied by a jurisdictional statement as prescribed by the rules of the Supreme Court. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the appellate court. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal.

(2) Time for taking appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

(b) Petition for review on writ of certiorari. (1) Petition. Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2) Time of making petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. If the judgment was entered in a district court in Alaska, Hawaii, Puerto Rico, Canal Zone, or Virgin Islands, the petition shall be deemed in time if mailed under a postmark dated within such 30-day period.

Rule 38. Stay of execution, and relief pending review.—(a) Stay of execution.

(1) Death. A sentence of death shall be stayed if an appeal is taken.

(2) Imprisonment. A sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is admitted to bail.

(3) Fine. A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets.

(4) Probation. An order placing the defendant on probation shall be stayed if an appeal is taken.

(b) Bail. Admission to bail upon appeal or certiorari shall be as provided in these rules.

(c) Application for relief pending review. If application is made to a court of appeals or to a circuit judge or to a justice of the Supreme Court for bail pending appeal or for an extension of time for filing the record on appeal or for any other relief which might have been granted by the district court, the application shall be upon notice and shall show that application to the court below or a judge thereof is not practicable or that application has been made and denied, with the reasons given for the denial, or that the action on the application did not afford the relief to which the applicant considers himself to be entitled.

Rule 39. Supervision of appeal.—(a) Supervision in appellate court. The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or to modify or vacate any order made by the district court or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail.

(b) The record on appeal. (1) Preparation and form. The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings, except as otherwise provided in these rules.

(2) Use of typewritten record. The court of appeals may dispense with the printing of the record on appeal and review the proceedings on the typewritten record.

(c) Docketing of appeal and record on appeal. The record on appeal shall be filed with the appellate court and the proceeding there docketed within 40 days from the date the notice of appeal is filed in the district court, but if more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date the first notice of appeal is filed. In all cases the district court or the appellate court or, if the appellate court is not in session, any judge thereof may for cause shown extend the time for filing and docketing.

(d) Setting the appeal for argument. Unless good cause is shown for an earlier hearing, the appellate court shall set the appeal for argument on a date not less than 30 days after the filing in that court of the record on appeal and as soon after the expiration of that period as the state of the calendar will permit. Preference shall be given to appeals in criminal cases over appeals in civil cases.

IX. SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 40. Commitment to another district; removal.—(a) Arrest in nearby district. If a person is arrested on a warrant issued upon a complaint in a district other than the district of the arrest but in the same state, or on a warrant issued upon a complaint in another state but at a place less than 100 miles from the place of arrest, or without a warrant for an offense committed in another district in the same state or in another state but at a place less than 100 miles from the place of the arrest, he shall be taken before the nearest available commissioner or other nearby officer described in Rule 5(a); preliminary proceedings shall be conducted in accordance with Rule 5(b) and (c); and if held to answer, he shall be held to answer to the district court for the district in which the prosecution is pending, or if the arrest was without a warrant, for the district in which the offense was committed. If such an arrest is made on a warrant issued on an indictment or information, the person arrested shall be taken before the district court in which the prosecution is pending or, for the purpose of admission to bail before a commissioner in the district of the arrest in accordance with provisions of Rule 9(c) (1).

(b) Arrest in distant district. (1) Appearance before commissioner or judge. If a person is arrested upon a warrant issued in another state at a place 100 miles or more from the place of arrest, or without a warrant for an offense committed in another state at a place 100 miles or more from the place of arrest, he shall be taken without unnecessary delay before the nearest available commissioner or a nearby judge of the United States in the district in which the arrest was made.

(2) Statement by commissioner or judge. The commissioner or judge shall inform the defendant of the charge against him, of his right to retain counsel and of his right to have a hearing or to waive a hearing by signing a waiver before the commissioner or judge. The commissioner or judge shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him, shall allow him reasonable opportunity to consult counsel and shall admit him to bail as provided in these rules.

(3) Hearing; warrant of removal or discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Other-

wise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

(4) Hearing and removal on arrest without a warrant. If a person is arrested without a warrant, the hearing may be continued for a reasonable time, upon a showing of probable cause to believe that he is guilty of the offense charged; but he may not be removed as herein provided unless a warrant issued in the district in which the offense was committed is presented.

Rule 41. Search and seizure.—(a) Authority to issue warrant. A search warrant authorized by this rule may be issued by a judge of the United States or of a state or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) Grounds for issuance. A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

(2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or

(3) Possessed, controlled, or designed or intended for use or which is or has been used in violation of Title 18, U. S. C., § 957.

(c) Issuance and contents. A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

(d) Execution and return with inventory. The warrant may be executed and returned only within 10 days after its date. The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The judge or commissioner shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(e) Motion for return of property and to suppress evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is

granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

(f) Return of papers to clerk. The judge or commissioner who has issued a search warrant shall attach to the warrant a copy of the return, inventory and all other papers in connection therewith and shall file them with the clerk of the district court for the district in which the property was seized.

(g) Scope and definition. This rule does not modify any act, inconsistent with it, regulating search, seizure and the issuance and execution of search warrants in circumstances for which special provision is made. The term "property" is used in this rule to include documents, books, papers and any other tangible objects.

Rule 42. Criminal contempt.—(a) Summary disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition upon notice and hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

X. GENERAL PROVISIONS

Rule 43. Presence of the defendant.—The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35.

Rule 44. Assignment of counsel.—If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel.

Rule 45. Time.—(a) Computation. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period if the failure to act was the result of excusable neglect; but the

court may not enlarge the period for taking any action under Rules 33, 34 and 35, except as otherwise provided in those rules, or the period for taking an appeal.

(c) Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act in a criminal proceeding.

(d) For motions; affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(e) Additional time after service by mail. Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, 3 days shall be added to the prescribed period.

Rule 46. Bail.—(a) Right to bail. (1) Before conviction. A person arrested for an offense not punishable by death shall be admitted to bail. A person arrested for an offense punishable by death may be admitted to bail by any court or judge authorized by law to do so in the exercise of discretion, giving due weight to the evidence and to the nature and circumstances of the offense.

(2) Upon review. Bail may be allowed pending appeal or certiorari only if it appears that the case involves a substantial question which should be determined by the appellate court. Bail may be allowed by the trial judge or by the appellate court or by any judge thereof or by the circuit justice. The court or the judge or justice allowing bail may at any time revoke the order admitting the defendant to bail.

(b) Bail for witness. If it appears by affidavit that the testimony of a person is material in any criminal proceeding and if it is shown that it may become impracticable to secure his presence by subpoena, the court or commissioner may require him to give bail for his appearance as a witness, in an amount fixed by the court or commissioner. If the person fails to give bail the court or commissioner may commit him to the custody of the marshal pending final disposition of the proceeding in which the testimony is needed, may order his release if he has been detained for an unreasonable length of time and may modify at any time the requirement as to bail.

(c) Amount. If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner or court or judge or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.

(d) Form, and place of deposit. A person required or permitted to give bail shall execute a bond for his appearance. One or more sureties may be required, cash or bonds or notes of the United States may be accepted and in proper cases no security need be required. Bail given originally on appeal shall be deposited in the registry of the district court from which the appeal is taken.

(e) Justification of sureties. Every surety, except a corporate surety which is approved as provided by law, shall justify by affidavit and may be required to describe in the affidavit the property by which he proposes to justify and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by him and remaining undischarged and all his other liabilities. No bond shall be approved unless the surety thereon appears to be qualified.

(f) Forfeiture. (1) Declaration. If there is a breach of conditions of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as

the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

(g) Exoneration. When the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any bail. A surety may be exonerated by a deposit of cash in the amount of the bond or by a timely surrender of the defendant into custody.

Rule 47. Motions.—An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

Rule 48. Dismissal.—(a) By attorney for government. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Rule 49. Service and filing of papers.—(a) Service; when required. Written motions other than those which are heard ex parte, written notices, designations of record on appeal and similar papers shall be served upon the adverse parties.

(b) Service; how made. Whenever under these rules or by an order of the court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions.

(c) Notice of orders. Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.

(d) Filing. Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

Rule 50. Calendars.—The district courts may provide for placing criminal proceedings upon appropriate calendars. Preference shall be given to criminal proceedings as far as practicable.

Rule 51. Exceptions unnecessary.—Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52. Harmless error and plain error.—(a) Harmless error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Rule 53. Regulation of conduct in the court room.—The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

Rule 54. Application and exception.—(a) Courts and commissioners. (1) Courts. These rules apply to all criminal proceedings in United States district courts which include the District Court for the Territory of Alaska, the District Court of the Virgin Islands; in the United States courts of appeals, and in the Supreme Court of the United States. The rules governing proceedings after verdict or finding of guilt or plea of guilty apply in the United States District Court for the District of the Canal Zone.

(2) Commissioners. The rules applicable to criminal proceedings before commissioners apply to similar proceedings before judges of the United States or of the District of Columbia. They do not apply to criminal proceedings before other officers empowered to commit persons charged with offenses against the United States.

(b) Proceedings. (1) Removed proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law.

(2) Offenses outside a district or state. These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district, except that such proceedings may be had in any district authorized by Title 18, U. S. C., § 3238.

(3) Peace bonds. These rules do not alter the power of judges of the United States or of United States commissioners to hold to security of the peace and for good behavior under, Title 18, U. S. C., § 3043, and under Revised Statutes § 4069, 50 U. S. C., § 23 [11 F. C. A., Title 50, § 23], but in such cases the procedure shall conform to these rules so far as they are applicable.

(4) Trials before commissioners. These rules do not apply to proceedings before United States commissioners and in the district courts under Title 18, U. S. C., §§ 3401, 3402, relating to petty offenses on federal reservations.

(5) Other proceedings. These rules are not applicable to extradition and rendition of fugitives; forfeiture of property for violation of a statute of the United States; or the collection of fines and penalties. They do not apply to proceedings under Title 18, U. S. C., chapter 403—Juvenile Delinquency—so far as they are inconsistent with that chapter. They do not apply to summary trials for offenses against the navigation laws under Revised Statute §§ 4300-4305, 33 U. S. C., §§ 391-396 [10 F. C. A., Title 33, §§ 391 to 396], or to proceedings involving disputes between seamen under Revised Statutes §§ 4079-4081, as amended, 22 U. S. C., §§ 256-258 [5 F. C. A., Title 22, §§ 256 to 258], or to proceedings for fishery offenses under the Act of June 28, 1937, c. 392, 50 Stat. 325-327, 16 U. S. C., §§ 772-772i [5 F. C. A., Title 16, §§ 772 to 772i], or to proceedings against a witness in a foreign country under Title 28, U. S. C., § 1784.

(c) Application of terms. As used in these rules the term "State" includes District of Columbia, territory and insular possession. "Law" includes statutes and judicial decisions. "Act of Congress" includes any act of Congress locally applicable to and in force in the District of Columbia, in a territory or in an insular possession. "District court" includes all district courts named in subdivision (a), paragraph (1) of this rule. "Civil action" refers to a civil action in a district court. "Oath" includes affirmations. "Attorney for the government" means the attorney general, an authorized assistant of the attorney general, a United States attorney and an authorized assistant of a United States attorney. The words "demurrer," "motion to quash," "plea in abatement," "plea in bar" and "special plea in bar," or words to the same effect, in any act of Congress shall be construed to mean the motion raising a defense or objection provided in Rule 12.

Rule 55. Records.—The clerk of the district court and each United States commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of the United States, may prescribe.

Rule 56. Courts and clerks.—The court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays.

Rule 57. Rules of court.—(a) Rules by district courts and courts of appeals. Rules made by district courts and courts of appeals for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court or by a court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

(b) Procedure not otherwise specified. If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

Rule 58. Forms.—The forms contained in the Appendix of Forms are illustrative and not mandatory.

Rule 59. Effective date.—These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

Note.—An order of December 27, 1948, amending rules 17, 41, 54, 55, 56, and 57, was reported to the first regular session of the 81st Congress on January 3, 1949. Paragraph 4 of the order provided that the amendments take effect on the day following the final adjournment of the first regular session of the 81st Congress; however, in as much as the amendments do nothing more than change nomenclature and substitute proper references to conform to the new criminal and judicial codes, it would appear that such changes became operative on September 1, 1948, the effective date of the revised Titles 18 and 28 of the United States Code.

Rule 60. Title.—These rules may be known and cited as the Federal Rules of Criminal Procedure.

**RULES OF PROCEDURE AND PRACTICE FOR THE TRIAL OF
CASES BEFORE COMMISSIONERS AND FOR TAKING AND
HEARING OF APPEALS TO THE DISTRICT COURTS OF
THE UNITED STATES, PRESCRIBED PURSUANT TO
THE ACT OF CONGRESS OF OCTOBER 9, 1940**

Adopted January 6, 1941

Order

Pursuant to the provisions of Section 2 of the Act of Congress, approved October 9, 1940, conferring jurisdiction upon certain United States Commissioners to try petty offenses committed on Federal reservations,

It is ordered on this sixth day of January, 1941, that the following rules be adopted as the Rules of Procedure and Practice for the Trial of Cases Before Commissioners and for Taking and Hearing of Appeals to the District Courts of the United States.

It is further ordered that these rules shall be applicable to proceedings instituted on or after February 1, 1941, and to pending proceedings except to the extent that in the opinion of the Commissioner or the Court their application would not be feasible or would work injustice.

Rule 1. Information and warrant.—A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged offense was committed and the place where it was committed and a description of the alleged offense.

If arrest is made on view, an information setting forth the same matters shall be made and filed before trial.

Rule 2. Trial.—The date of trial shall be fixed at such a time as will afford the defendant a reasonable opportunity for preparation and for representation by counsel if desired.

The trial shall be conducted as are trials of criminal cases in the District Court by a District judge in a criminal case where a jury is waived.

Rule 3. Docket.—The Commissioner's proceedings shall be entered in his docket, which shall show: (1) The defendant's written consent to be tried before the Commissioner; (2) the date of the information and upon whose oath it was made; (3) the date of the issue and service of the warrant; (4) the defendant's plea or pleas; (5) the names of the witnesses for the United States and for the defendant and a condensed summary of the testimony of each, and of any documentary evidence received; (6) the judgment and sentence of the Commissioner.

Rule 4. Appeal.—1. Motions subsequent to judgment of conviction shall not be entertained by the Commissioner.

2. An appeal shall be taken within five days after entry of judgment of conviction. An appeal shall be taken by filing with the Commissioner a notice in duplicate stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney. The notice of appeal shall set forth the title of the case, the names and addresses of the appellant and the appellant's attorney, if any; a general statement of the nature of the offense; the date of the judgment; the sentence imposed and, if the appellant is in custody, the prison where he is confined. The notice shall also contain a succinct statement of the grounds of appeal which shall serve as the appellant's assignments of error and shall follow substantially the form hereto annexed. [See Form 772A.]

3. The Commissioner shall immediately forward to the Clerk of the District Court the duplicate notice of appeal together with a transcript of his docket entries and copies of the information, the warrant, the defendant's written consent to be

tried before the Commissioner, and any order concerning bail, pending appeal, certified under his hand and seal. From the time of the filing of the Commissioner's certificate the District Court shall have supervision and control of the proceedings on appeal and may at any time, upon five days' notice, entertain a motion to dismiss it or for directions to the Commissioner or to vacate or modify any order of the Commissioner in relation to the appeal, including any order for the granting of bail.

4. An appeal from a judgment of conviction stays the execution of the judgment unless the defendant, pending his appeal, shall elect to enter upon the service of the sentence.

5. The defendant shall not be admitted to bail pending appeal from a judgment of conviction save as follows: Bail may be granted by the Commissioner or by the District Court or any judge thereof; but bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the District Court.

6. The record on appeal shall consist of the matters certified by the Commissioner pursuant to paragraph 3. No bill of exceptions and no assignments of error other than those set forth as ground for appeal shall be required. The defendant shall not be entitled to a trial *de novo* in the District Court and the decision of the Commissioner upon questions of fact shall not be reexamined by the District Court. Only errors of law apparent from the record as certified by the Commissioner shall be considered by the court.

Rule 5. New trial for after-discovered evidence.—Within sixty days after conviction a defendant may move for a new trial on the ground of after-discovered evidence. The motion shall be in writing, addressed to the Commissioner and shall set forth under oath the nature of the evidence and the reason it was unavailable at the trial. A copy of the motion shall forthwith be served upon the United States Attorney. The Commissioner shall transmit the motion together with a transcript of his docket entries to the District Court. That court shall hear the motion, and, if it deems a sufficient showing has been made, may vacate the judgment of conviction and direct the Commissioner to retry the case.

Rule 6. District Court rules.—The District Courts may, by order or standing rule, not inconsistent with these rules, regulate the practice and procedure on appeals from convictions before a Commissioner.

RULES OF THE UNITED STATES EMERGENCY COURT OF APPEALS

As Adopted June 4, 1948

Effective July 1, 1948

GENERAL

Rule

1. Name of Court.....
2. Seal
3. Divisions of the Court.....
4. Sessions
5. Quorum—Interlocutory Orders.....
6. Clerk
7. Court Employees Not to Practice Law.....
8. Attorneys—Qualifications—Admission to Practice.....
9. Practice, Process, and Service.....
10. Time
11. Opinions of the Court.....
12. Entry of Orders and Judgments.....
13. Rehearing
14. Death of a Party—Substitution.....

PROCEEDINGS UNDER THE EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED, AND THE ACT OF JUNE 23, 1945

15. Complaints under Sec. 204 (a) or (e)—Petitions for Mandatory Relief under Section 203 (d)—Proceedings for Review of Subsidy Determinations under Sec. 2 of Act of June 23, 1945—Filing and Docketing—Appearance.....
16. Form and Contents of Complaint under Sec. 204 (a) or (e) or under Sec. 2 of Act of June 23, 1945.....
17. Form and Size of Papers Generally in All Cases—Number of Copies to be filed
18. Motion to Dismiss.....
19. Petitions for Mandatory Relief under Sec. 203 (d)—Motions Generally—Objections or Answer Thereto.....
20. Transcript
21. Answer to Complaint under Sec. 204 (a) or (e) or under Sec. 2 of Act of June 23, 1945—Motion for Judgment on the Pleadings—Dismissal of Complaint under Sec. 204 (e) for Failure to Proceed.....
22. Amendment to Pleadings.....
23. Introduction of Evidence by Leave of Court.....
24. Consolidating Similar Cases.....
25. Dismissal by Agreement.....
26. Briefs in Cases Brought under Sec. 204 (a) or (e) or Sec. 2 of Act of June 23, 1945.....
27. Hearing Calendar.....
28. Hearing
29. Fees and Costs.....

PROCEEDINGS UNDER HOUSING AND RENT ACT OF 1947, AS AMENDED

Rule

- 30. Filing of Recommendations of Local Board and other Material-----
- 31. Appearances -----
- 32. Introduction of Additional Evidence to Court-----
- 33. Motions for Summary Disapproval-----
- 34. Withdrawal of Recommendation in Whole or in Part-----
- 35. Briefs -----
- 36. Hearings -----
- 37. Orders Approving or Disapproving Recommendations-----
- 38. Fees and Costs-----

GENERAL

Rule 1. Name of Court.—The court adopts “United States Emergency Court of Appeals” as the title of the court.

Rule 2. Seal.—The seal shall contain the words “United States” on the upper part of the outer edge; word “Emergency” in the center; and the words “Court of Appeals” on the lower part of the outer edge, running from left to right.

Rule 3. Divisions of the Court.—(a) Creation of divisions. The chief judge may, from time to time, divide the court into divisions of three or more members.

(b) Assignment of cases to divisions. Reassignment. Any complaint or other proceeding pending in the court or any motion, application, or suggestion made in connection with any pending complaint or other proceeding may be assigned by the chief judge to a division for hearing and determination, and may at any time before final determination thereof by such division be reassigned by the chief judge to another division or to the court for further hearing and determination.

(c) Hearing and Determination by Divisions. Power to enter judgments and orders. A division to which a complaint or other proceeding or a motion, application, or suggestion made in connection therewith is assigned by the chief judge shall hear and determine the matter so assigned to it, unless the matter is subsequently reassigned to another division or to the court, and may render any judgment or make any order therein which the court would have been empowered to make if the matter had not been assigned to a division. Every such judgment rendered or order made by a division shall be rendered as the judgment or made as the order of the court and shall be so entered by the clerk.

Rule 4. Sessions.—(a) Court Always Open. Place and time of sessions. The court shall have no stated terms but shall always be open for the transaction of business. The court or its divisions shall hold sessions in Washington in the District of Columbia, or in other places designated by the chief judge, and at such times as may be fixed by the chief judge from time to time.

(b) Judges who shall preside. At all sessions of the court and of its divisions the chief judge shall preside if he is in attendance. In his absence the circuit judge senior in commission shall preside and if no circuit judge is in attendance the district judge senior in commission shall preside.

Rule 5. Quorum—Interlocutory Orders.—(a) Quorum. Two judges shall constitute a quorum of the court and of each division thereof. If a quorum does not attend at any place on any day appointed for holding a session of the court or of a division thereof at that place, the judge who does attend may adjourn the court or division from time to time, or, if no judge is present, the clerk or his deputy in attendance may adjourn the court or division from day to day.

(b) Interlocutory orders. The chief judge or, in his absence from the District of Columbia, the senior judge there present, in chambers may make all necessary orders of a purely procedural nature relating to any complaint or proceeding pending in the court, preparatory to the hearing or decision thereof.

Rule 6. Clerk.—(a) Office location—duties. The clerk shall maintain his office in Washington, in the District of Columbia. His duties shall be such as are prescribed by these rules and by the court from time to time.

(b) Bond. The clerk shall give bond in such form and amount as the court may determine to be satisfactory, for the faithful performance of his duties.

(c) Shall attend sessions. The clerk or his deputy shall attend in person the sessions of the court and of each division thereof.

(d) Office hours. The clerk shall keep his office open for the transaction of business from 9 o'clock a.m. until 4 o'clock p.m. on week days not holidays, except that on Saturday it shall close at noon.

(e) Records. The files and records of the court shall be kept in the custody of the clerk, and original papers and documents shall not be withdrawn from his custody except upon order of the court or a judge thereof, provided, however, that a copy of the transcript on file may be delivered by the clerk to a party for use in preparing briefs.

(f) Keeper of seal. The clerk shall be the keeper of the seal, and shall apply the same upon all process issued from this court; and in the authentication of all records of the proceedings of the court and the transcripts thereof, and certificates proper to be issued by him, the seal shall be applied by the clerk as the means of proper authentication.

(g) Deputy clerks. The court may appoint one or more permanent deputy clerks and such temporary deputy clerks as may be needed from time to time to attend particular sessions of the court or its divisions. Secretaries and law clerks of judges of the court may be designated to act as such temporary deputy clerks without additional compensation. Each permanent deputy clerk shall give bond in such form and amount as the court may determine to be satisfactory, for the faithful performance of the duties to be assigned to him from time to time by the clerk. The deputy clerks may sign the name of the clerk to any official act required by law or by the practice of the court to be performed by the clerk, and may authenticate said signature by affixing the seal of the court thereto when the impress of the seal is necessary to its authentication. In such case the signature shall be:

Clerk.

By: -----
Deputy Clerk.

(h) Fees to be paid prior to filing. The clerk shall not be required to file any paper or record in his office or docket any proceeding until payment of the required fee has been made.

Rule 7. Court Employees Not to Practice Law.—No one employed in any capacity under this court shall engage in the practice of law while continuing in such position; nor shall he after separating from that position practice as an attorney in connection with any case pending in this court during his term of service, or permit his name to appear on a brief filed in connection with any such case.

Rule 8. Attorneys. Qualifications—Admission to Practice.—Any person who is a member in good standing of the bar of the Supreme Court of the United States, or of any circuit court of appeals of the United States, including the United States Court of Appeals for the District of Columbia, or of any district court of the United States, or of the highest appellate court of any State or Territory, shall be entitled, while he maintains such good standing, to practice before this court or any division thereof after filing written application with the clerk, accompanied by a certificate from the clerk of the proper court showing that the applicant possesses the foregoing qualifications, and, after approval of such application by the clerk, upon subscribing the oath (or affirmation) prescribed by Rule 2 of the Supreme Court of the United States. Application for admission to practice may be made by mail. A person who may not be eligible under the foregoing provisions, but who is appointed to represent a governmental officer or agency of the United States in proceedings under Section 204 or 205 of the Emergency Price Control Act of 1942, as amended, or a governmental officer or agency, a local advisory board in a defense-rental area or a state in proceedings under Section 204 (e) (4) of the Housing and Rent Act of 1947, as amended, may appear in a representative capacity in any case in this court upon filing with the clerk suitable written authority from such governmental officer or the head of such governmental agency of the United States for representation generally or in a particular case or cases, or suitable written authority from such local board or the governor of such state for representation in a particular case or cases.

Rule 9. Practice, Process and Service.—(a) **Practice.** Except as otherwise provided by law or by these rules the practice shall conform to that prescribed by the Federal Rules of Civil Procedure.

(b) **Process.** All process of the court shall be in the name of the President of the United States, and shall contain the given names, as well as the surnames, of the parties.

(c) **Service.** Service of all papers except the recommendation of the local board and other materials comprising the record in a case filed pursuant to Section 204 (e) (4) of the Housing and Rent Act of 1947, as amended, shall be made by the clerk unless the party filing the same shall file therewith a written acknowledgment or acceptance of service thereof by the other party, showing the date of such acknowledgment or acceptance. Five copies of all such papers shall be served on any governmental officer or agency which is a party and one copy of all such papers (three copies if the paper is printed) on all other parties, including local advisory boards in defense-rental areas and representatives of states. Upon the filing of a case pursuant to Section 204 (e) (4) of the Housing and Rent Act of 1947, as amended, the Housing Expediter shall serve the respondent local board with such portions of the record before the court as were added thereto by the Housing Expediter after certification of the record to him by such local board, including any statement of information or evidence incorporated into the record by the Housing Expediter, and shall certify to the court that he has done so. Service by the clerk on a governmental officer or agency having an office in the District of Columbia shall be made by mailing the copies to the officer or agency at Washington in the District of Columbia. Service by the clerk on each other party shall be made by mailing the copy to his or its attorney of record or, if the party is not represented by an attorney, then to the party at his or its address shown on a pleading or other paper filed with the court, or, in the case of a state to the governor of the state. The clerk shall note on his docket the names of the parties to whom he mails copies with date of mailing. (See also Rule 10 (b).)

Rule 10. Time.—(a) **Manner of computing.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **Computation of time.** When under these rules the time for doing an act is to run from the time of service of any pleading or paper, the time shall be computed:

(1) If served by the clerk by mailing, from the third day after the date of mailing as noted on his docket.

(2) If service is acknowledged or accepted by a party, from the date of such acknowledgment or acceptance.

(c) **Enlargement.** When by these rules or by order of this court an act is required or allowed to be done at or within a specified time, the court or a judge thereof for cause shown may (except where the time is also fixed by statute), at any time in the discretion of the court or a judge thereof, (1) upon motion order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect.

Rule 11. Opinions of the Court.—(a) **Printed—**rendered by filing with clerk. All opinions of the court shall be printed, unless otherwise ordered, under the supervision of the judge writing the opinion, and shall be rendered by being filed with the clerk. The clerk shall preserve the original opinions.

(b) **Deposit for printing.** On demand by the clerk the complainant or petitioner, in a proceeding filed under the Emergency Price Control Act of 1942, as amended, or under Section 2 of the Act of June 23, 1945, shall, within 5 days thereof, deposit with the clerk a sum estimated by him to cover the cost of printing the opinion, the unexpended balance of such deposit to be refunded after final disposition of the case.

(c) Recorded when bound. Opinions need not be copied by the clerk into the minute book of the court, but he shall from time to time cause copies of the opinions to be bound in a substantial manner into volumes and when so bound they shall be deemed to have been recorded.

Rule 12. Entry of Orders and Judgments.—All orders and judgments, interlocutory or final, shall be entered on the date such orders or judgments are filed with the clerk.

Rule 13. Rehearing.—Petitions for rehearing or modification of judgment shall be made in writing and filed with the clerk of the court within 10 days after the judgment is entered. Each such petition will be acted upon by the court without oral argument, unless otherwise ordered, and will not be granted unless a judge who concurred in the judgment desires it, or the court so determines.

Rule 14. Death of a Party—Substitution.—(a) Generally. Where, during the pendency of a case in this court, the complainant, not being a public officer, shall die, the representatives of such deceased party may voluntarily enter their appearances and on motion be admitted as parties. If such representatives shall not voluntarily become parties, then the respondent may suggest the death on the record, and proceedings shall be had as the court directs.

(b) Public officer. Where a public officer, by or against whom a suit is brought, dies or ceases to hold the office while the suit is pending in this court, the matter of abatement and substitution is covered by Section 11 of Act of Feb. 13, 1925, c. 229 (43 Stat. 941), U. S. C., title 28, sec. 780.

PROCEEDINGS UNDER THE EMERGENCY

PRICE CONTROL ACT OF

1942, AS AMENDED, AND THE ACT OF JUNE 23, 1945

Rule 15. Complaints Under Section 204 (a) or (e)—Petitions for Mandatory Relief Under Section 203 (d)—Proceedings for Review of Subsidy Determinations Under Section 2 of Act of June 23, 1945—Filing and Docketing—Appearance.—(a) Filing and docketing. Proceedings brought in the court to enjoin or set aside a regulation, order or price schedule under paragraph (a) or (e) of Section 204 of the Emergency Price Control Act of 1942, as amended, shall be begun by filing a complaint in the clerk's office. Proceedings brought in the court to secure mandatory relief under Section 203 (d) of the Emergency Price Control Act of 1942, as amended, shall be begun by filing a petition in the clerk's office. Proceedings for review of subsidy determinations by the appropriate governmental officer or agency under Section 2 of the Act of June 23, 1945 (59 Stat. 261) and Directive No. 62 of the Economic Stabilization Director (10 F. R. 8242) shall be begun, within 30 days of the effective date of such determination, by filing a complaint in the clerk's office. Upon the filing of a complaint or petition and ten conformed copies thereof and the payment of the filing fee, the clerk shall enter the case upon the docket in his office and shall assign a file number to it. The file number shall be noted on docket and on the complaint or petition and all papers subsequently filed in the case.

(b) Deposit for costs. The complaint or petitioner shall at the time of docketing the case make a deposit with the clerk of \$35.00 on account of fees and costs to be incurred by him in this court, any unexpended amount to be returned to the party who deposited it after final disposition of the case.

(c) Time for filing appearance. Counsel for the complainant or petitioner shall enter his appearance at or after the time that the complaint or petition is filed but before any further steps are taken by the complainant or petitioner in the case. Counsel for the respondent shall enter his appearance at or before the time of filing his answer or any preliminary motion in the case.

Rule 16. Form and Contents of Complaint Under Section 204 (a) or (e) or under Section 2 of Act of June 23, 1945.—(a) Form. The complaint shall contain a caption setting forth the name of the court; and the title of the case, giving the name of the complainant, versus the governmental officer or agency named as respondent, e. g. John Doe v. Tighe E. Woods, Housing Expediter.

(b) Contents of complaints under Section 204 (a). Each complaint filed under Section 204 (a) of the Emergency Price Control Act of 1942 shall specify in separate numbered paragraphs (1) the name and principal business address of the complainant; (2) the regulation, order or price schedule protested and the effective date thereof; (3) the date on which the protest of such regulation, order, or price

schedule was filed with the appropriate governmental officer or agency and the date and character of the disposition of such protest by such officer or agency; (4) the manner in which the complainant has been aggrieved by the denial or partial denial of his protest; (5) the objections asserted in the protest against the regulation, order, or price schedule protested which are intended to be relied upon in support of the complaint, each objection being stated concisely in a separate numbered paragraph and the facts relied upon in support of each objection being briefly set forth in the paragraph in which the objection is stated or in separate subnumbered paragraphs immediately following it; and (6) the nature of the relief requested. The complaint need not be verified but shall be signed by the complainant or his attorney of record in this court in his individual name. Following the signature an address shall be stated at which papers may be served upon the complainant or his attorney.

(c) Contents of complaint under Section 204 (e). Each complaint filed under Section 204 (e) of the Emergency Price Control Act of 1942, as amended, shall specify in separate numbered paragraphs (1) the name and principal business address of the complainant; (2) the regulation, order or price schedule objected to and the effective date thereof; (3) the date on which leave was granted to file the complaint and the court granting the leave (true copies of the application for such leave and of the order of the court granting it being annexed to the complaint); (4) the manner in which the complainant is subject to the regulation, order, or price schedule complained of; (5) the objections with respect to which leave to file the complaint was granted which are intended to be relied upon in support of the complaint, each objection being stated concisely in a separate numbered paragraph and the facts relied upon in support of each objection being briefly set forth in the paragraph in which the objection is stated or in separate subnumbered paragraphs immediately following it; and (6) the nature of the relief requested. The complaint need not be verified but shall be signed by the complainant or his attorney of record in this court in his individual name. Following the signature an address shall be stated at which papers may be served upon the complainant or his attorney.

(d) Contents of complaint under section 2 of Act of June 23, 1945. Each complaint filed under Section 2 of the Act of June 23, 1945, shall specify in separate numbered paragraphs (1) the name and principal business address of the complainant; (2) the determination complained of and the effective date thereof; (3) the manner in which the complainant has been aggrieved by the determination; (4) the objections which complainant intends to urge against the determination, each objection being stated concisely in separate numbered paragraphs and the facts relied upon in support of each objection being briefly set forth in the paragraph in which the objection is stated or in a separate subnumbered paragraph immediately following. The complaint need not be verified but shall be signed by the complainant or his attorney of record in this court in his individual name. Following the signature an address shall be stated at which papers may be served upon the complainant or his attorney.

Rule 17. Form and Size of Papers Generally in All Cases. Number of Copies to be Filed.—(a) Legibility. All pleadings, motions, briefs, and other papers filed in a case shall be printed, typewritten, or prepared by means of a conventional duplicating process.

(b) Caption. All papers filed in a case shall be captioned in the manner set forth in Rule 16(a).

(c) Papers to be signed. Effect of signature. Every pleading or other paper filed in a case shall be signed by at least one attorney of record in his individual name whose address shall be stated. A party who is not represented by the attorney shall himself sign such papers and shall state his address. Pleadings need not be verified or accompanied by an affidavit. The signature of an attorney constitutes a certificate by him that he has read the paper signed, that to the best of his knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay.

(d) Form of printed papers. Printed papers shall be on opaque unglazed white paper, of such form and size that they can be conveniently bound so as to make an ordinary octavo volume, having pages 6 1/8 inches by 9 1/4 inches and typed matter 4 1/6 inches by 7 1/6 inches. They and all quotations contained therein and the matter appearing on the covers shall be printed in clear type (never smaller than small pica or 11 point type) adequately leaded.

(e) Form of typewritten papers. Typewritten papers shall be on one side only of opaque unglazed white paper (papers prepared by a duplicating process to be on standard duplicating paper), not larger than 8 inches by 10½ inches in size, and shall be bound on the left margin. They shall be double-spaced except for quotations, which may be single-spaced and indented. The clerk shall refuse to file typewritten carbon copies which are not clearly legible.

(f) Number of copies to be filed by complainant or petitioner. The complainant or petitioner shall file with the clerk an original and at least 10 copies of every pleading, brief, or other paper filed by him unless he shall file an acknowledgment or acceptance of service of the same, in which event only 5 copies (in addition to the original) need be filed. The copies before filing shall be conformed to the original thereof.

(g) Number of copies to be filed by respondent. The respondent shall file with the clerk an original and at least six copies of every pleading, brief, or other paper filed by him unless he shall file an acknowledgment or acceptance of service of the same, in which event only five copies (in addition to the original) need be filed. The copies before filing shall be conformed to the original thereof.

(h) Number of copies of printed papers to be filed. If a pleading, brief or other paper is printed, at least 30 copies shall be filed with the clerk, instead of the number specified in paragraphs (f) and (g) of this rule. One of the printed copies shall bear the signature of the party filing same, or his counsel of record.

Rule 18. Motion to Dismiss.—Within 10 days after the service of the complaint the respondent may file a motion to dismiss the complaint or to strike any portion thereof. No objection shall be waived by the failure to file such a motion, but may be included in any answer filed under Rule 21.

Rule 19. Petitions for mandatory relief under section 203(d). Motions generally. Objections or Answer Thereto.—(a) Petitions under section 203(d)—Motions—Form. All petitions for mandatory relief under Section 203(d) of the Emergency Price Control Act of 1942, as amended, and all motions shall briefly and clearly set forth the relief sought and the grounds upon which the petition or motion is based. They need not be verified but shall be signed by the petitioner or moving party or his attorney of record in this court in his individual name.

(b) Objections or answer. Within 5 days after service of any petition or motion the other party may file objections in which shall be clearly set forth the reasons why the granting of the petition or motion is opposed, or may file an answer.

(c) Briefs. No oral argument unless specially ordered. The petitioner or moving party may file a brief with his petition or motion and the other party may file an answering brief with his objections or answer. Such briefs shall conform as nearly as may be to the requirements of Rule 26. All petitions and motions shall be determined without oral argument unless otherwise ordered.

Rule 20. Transcript.—(a) Transcript of protest proceedings under section 204 (a)—Certification and filing. A transcript of such portions of the proceedings in connection with the protest as are material under the complaint, including a statement setting forth so far as practicable the economic data and other facts of which the respondent has taken official notice, shall be certified by the respondent and filed with the clerk as promptly as practicable and in no event later than 20 days after the service upon the respondent of a complaint filed under Section 204(a) of the Emergency Price Control Act of 1942; except, that if a motion to dismiss the complaint or to strike any portion of it is filed by the respondent pursuant to Rule 18, the transcript may be filed not later than 15 days after service upon the respondent of the order disposing of such motion.

(b) Transcript of evidence taken by order of court under Section 204(a) or (e)—Certification and filing. If, pursuant to order of the court, as provided in Rule 23, evidence is presented to and received by the appropriate governmental officer or agency in a case under paragraph (a) or (e) of Section 204 of the Emergency Price Control Act of 1942, as amended, a transcript or, if a transcript has previously been filed in the case, a supplemental transcript of such evidence and such other evidence as such officer or agency shall have deemed necessary or proper to be received, together with any modification made in the regulation, order, or price schedule as a result thereof, and any statement or opinion of such officer or agency with respect thereto, shall be certified by the respondent and filed with the clerk within 10 days after such evidence shall have been received

or modification shall have been made in the regulation, order or price schedule, or statement or opinion shall have been issued, but in no event later than 30 days after such evidence shall have been received.

(c) Transcript of proceedings under section 2 of Act of June 23, 1945—Certification and filing. The respondent shall, within 30 days after service of a complaint against a determination under Section 2 of the Act of June 23, 1945, file with the clerk a certified transcript of the proceedings before him which shall include the application upon which the determination was rendered, the evidence presented in connection therewith, and the decision rendered thereon, including any statement or opinion of the respondent accompanying the decision and setting forth any findings and determinations made by the respondent in connection therewith.

(d) Ten copies to be filed. Unless otherwise ordered by the court, 10 clearly legible copies of such transcript and supplemental transcript, if any, shall be filed with the clerk, and 3 copies thereof shall be served upon the complainant by the clerk as provided in Rule 9(c).

(e) Correction. If anything material to either party is omitted from the transcript or supplemental transcript of proceedings by error or accident or is misstated therein, the parties by stipulation, or this court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental transcript shall be certified and transmitted by the respondent.

(f) Transcript need not be printed. It shall be unnecessary in this court to print the transcript of the proceedings filed by the respondent.

(g) Transmittal of original papers—Physical exhibits. Whenever the respondent is of opinion that original papers or exhibits should be inspected by the court or sent to the court in lieu of copies thereof in the transcript, he may make such order therefor and for the safekeeping, transportation, and return thereof as he deems proper.

Rule 21. Answer to complaint under section 204(a) or (e) or under section 2 of Act of June 23, 1945. Motion for judgment on the pleadings. Dismissal of complaint under Section 204(e) for failure to proceed.—(a) Answer. Time of filing. Contents. Within 20 days after service upon the respondent of a complaint filed under paragraph (a) or (e) of Section 204 of the Emergency Price Control Act of 1942, as amended, or under Section 2 of the Act of June 23, 1945, the respondent shall file an answer to the complaint; except that if a motion to dismiss the complaint or to strike any portion of it is filed by respondent pursuant to Rule 18, the answer may be filed not later than 15 days after service upon respondent of the order disposing of such motion. The answer may include objections which could have been raised by motion under Rule 18, and shall include admissions or denials of the facts alleged in the complaint and any new matter constituting a defense. If the respondent is without knowledge or information sufficient to form a belief as to the truth of an averment he shall so state and this shall have the effect of a denial. Facts alleged in the complaint and not denied in the answer may be taken as admitted.

(b) Motion for judgment on the pleadings. Time of filing. Within 10 days after service of the answer to a complaint filed under Section 204(e) of the Emergency Price Control Act of 1942, as amended, the complainant may file a motion for judgment on the pleadings.

(c) Dismissal for failure to proceed after filing complaint under section 204(e). If the complainant, after the filing of a complaint under Section 204(e) and the filing of the answer thereto, does not file a motion for judgment on the pleadings within the time provided by this rule, or an application for leave to introduce evidence within the time provided under Rule 23(a), and the respondent does not file an application for leave to introduce evidence, the complaint may be dismissed on the motion of the respondent or on the court's own initiative.

Rule 22. Amendment to Pleadings.—Pleadings may be amended before final judgment upon leave of court granted when justice so requires, provided that no complaint may be amended to specify objections that were not set forth by the complainant in his protest filed with the appropriate governmental officer or agency or in his application for leave to file the complaint, as the case may be.

Rule 23. Introduction of evidence by leave of court.—(a) Applications for leave to introduce evidence under Section 204(e). Within 10 days after service of the answer to a complaint filed under Section 204(e) of the Emergency Price

Control Act of 1942, as amended, the complainant may file an application for leave to introduce evidence in support of the allegations of fact of the complaint which are denied by the answer and the respondent may apply for leave to introduce evidence in support of any new matter constituting a defense set forth in the answer. Such application shall contain an offer of proof with respect to the evidence sought to be introduced, setting forth the character and form of such evidence and a summary of what evidence would show if admitted.

Within 5 days after service of an application for leave to introduce evidence the other party may file objections thereto, which may include an admission in whole or in part of the truth of any of the evidence offered in the application and a motion to dismiss the complaint or for judgment on the pleadings on the ground that the evidence offered, even if true, would be insufficient to establish a right to relief or an affirmative defense, as the case may be. The application together with any such objections, admissions, and motions shall be submitted to the court without oral argument unless otherwise directed by the court. A copy of the order disposing of the application shall be served by the clerk upon the parties as provided in Rule 9(c).

(b) Application for leave to introduce additional evidence under Section 204(a) or (e) or Section 2 of Act of June 23, 1945. Within 10 days after service of the transcript in a case brought under paragraph (a) or (e) of Section 204 of the Emergency Price Control Act of 1942, as amended, or Section 2 of the Act of June 23, 1945, the complainant or the respondent may file an application for leave to introduce additional evidence. Such application shall contain (1) an offer of proof with respect to the additional evidence sought to be introduced, setting forth the character and form of such evidence and a summary of what such evidence would show if admitted; (2) a statement showing either that such evidence was offered to the appropriate governmental officer or agency and not admitted (with appropriate references to the transcript), or that such evidence could not reasonably have been offered to such officer or agency or included by the respondent in the transcript; and (3) a statement showing that such evidence is necessary to a proper disposition of the case. Within 5 days after service of the application any party affected may file objections thereto. The application, together with any objections thereto, shall be submitted to the court without oral argument, unless otherwise directed by the court. A copy of the order disposing of the application shall be served by the clerk upon the parties as provided in Rule 9(c).

(c) Manner of presenting evidence to governmental officer or agency. Whenever evidence is ordered to be presented to a governmental officer or agency such officer or agency shall, unless the court in its order has done so, fix a time, and, if oral evidence is to be presented, a place, reasonably convenient to the complainant, for the presentation of such evidence. The presentation of such evidence and of such other evidence as such officer or agency deems necessary or proper to receive shall be commenced at the time and place so appointed unless an adjournment is granted by such officer or agency and shall be completed with all reasonable dispatch. Such officer or agency may regulate the proceedings for the receipt of evidence authorized to be presented to such officer or agency under this rule and may do all acts and take all measures necessary or proper for the efficient performance of the duties of such officer or agency under the order of the court authorizing the presentation of such evidence to such officer or agency. Such officer or agency may rule upon the admissibility of evidence presented by the complainant unless otherwise directed by the order of the court. When the complainant so requests, such officer or agency shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) of the Federal Rules of Civil Procedure for a court sitting without a jury. Such officer or agency may delegate the powers of such officer or agency under this paragraph to a presiding officer appointed by such officer or agency. If the complainant is aggrieved by the exclusion of evidence by such officer or agency, he may make application to the court for leave to introduce such evidence pursuant to and within the time limited by paragraph (b) of this rule.

(d) Manner of presenting evidence to court. Whenever evidence shall be ordered presented directly to the court the court will determine whether such evidence shall be taken in open court, by deposition, written interrogatories, or affidavits.

Rule 24. Consolidating Similar Cases.—When complaints involving common questions of law or fact are pending, the court on motion or of its own initiative may order all such cases consolidated for hearing, and may make such further orders concerning proceedings therein as may tend to avoid unnecessary costs or delays.

Rule 25. Dismissal by agreement.—Whenever, after a case has been docketed in this court and prior to the hearing thereof, the complainant or petitioner and respondent shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and shall pay to the clerk any fees that may be due him, it shall be the duty of the clerk to enter such dismissal and to transmit forthwith a certified copy of the agreement to the respondent, but no process shall issue without an order of the court.

Rule 26. Briefs in cases brought under Section 204(a) or (e) or Section 2 of Act of June 23, 1945.—(a) Time of filing complainant's brief. Except as provided in subparagraphs 1 and 2 hereof, the complainant shall file his brief in support of the complaint within 20 days after service upon him of the transcript.

(1) When application for leave to introduce additional evidence is filed pursuant to Rule 23 and the same is denied by the court, or when a suggestion of an omission from or misstatement in the transcript is made pursuant to Rule 20 and rejected by the court, complainant shall file his brief within 15 days after service of the order of denial or rejection.

(2) When evidence is ordered to be taken pursuant to Rule 23, or the transcript is ordered to be corrected pursuant to Rule 20, the complainant shall file his brief within 15 days after service of the transcript or supplemental transcript containing such evidence or correction if such evidence is presented to a governmental officer or agency or such correction is made by supplemental transcript, or within such time as the court may direct, if such evidence is presented to the court or such correction is made otherwise than by supplemental transcript.

(3) When in a case brought under Section 204(e) of the Emergency Price Control Act of 1942, as amended, no application for leave to introduce evidence is filed by either party but a motion for judgment on the pleadings is filed by the complainant, he shall file his brief with the motion.

(b) Contents of complainant's brief. The complainant's brief shall contain:

(1) A table of contents and a table of citations, the latter alphabetically arranged.

(2) A statement of the case, which shall consist of a concise, chronological, nonargumentative statement, in narrative form, of all the facts which should be known in order to determine the points in controversy. In the statement reference shall be made to the pages of the transcript of the proceedings before the appropriate governmental officer or agency or of the evidence presented to such officer or agency or to the court which are relied upon to support the facts stated.

(3) Preceding the argument, a concise summary of the argument, suitably paraphrased.

Note.

The summary of the argument should be a succinct, but accurate and clear, picture of the argument actually made in the brief concerning the points in controversy. Because the summary of argument if properly prepared is most helpful to the court in following the oral argument and will often render unnecessary the making of inquiries by the court which consume time allowed for argument, counsel are urged to prepare the summary with great care.

(4) An argument, which shall be divided, under appropriate headings distinctively arranged, into as many parts as there are points to be argued. All cases shall be cited to the official reports, if any, and also to the National Reporter System, if reported therein. Statutes shall be cited to the volume and page of the statutes at large or other session laws, and also to an official or standard code, revision or compilation where they may be found. Citations to textbooks, treatises, and other publications shall include the edition and year of publication.

(c) Time of filing respondent's brief. The respondent shall file his brief within 20 days after service upon him of the complainant's brief.

(d) Contents of respondent's brief. The respondent's brief shall contain:

(1) A table of contents and a table of citations, the latter alphabetically arranged.

(2) A counterstatement of the case conforming to the requirements of paragraph (b) (2) of this rule, if he disagrees with the statement of the complainant.

(3) Preceding the argument, a concise summary of the argument, suitably paraphrased.

Note.

The summary of the argument should be a succinct, but accurate and clear, picture of the argument actually made in the brief concerning the points in controversy. Because the summary of argument if properly prepared is most helpful to the court in following the oral argument and will often render unnecessary the making of inquiries by the court which consume time allowed for argument, counsel are urged to prepare the summary with great care.

(4) An argument, which shall conform to the requirements of paragraph (b) (4) of this rule.

(e) Complainant's reply brief. The complainant may file a reply brief within 10 days after the service upon him of the respondent's brief.

(f) Briefs shall be bound—length. All briefs shall be bound in suitable covers and shall not exceed 50 pages in length except by special permission of the court; but this limitation shall not apply to the table of contents and table of citations.

(g) Objections not presented. Objections stated in the complaint but not presented in the brief may be disregarded by the court.

(h) Briefs after argument. No brief or memorandum will be received, through the clerk or otherwise, after a case has been argued or submitted, except by leave of court at the time of argument or on written motion filed with the clerk.

(i) Filing after time. No brief shall be filed after the expiration of the time allowed, except by leave of court for extraordinary reasons shown.

Rule 27. Hearing Calendar.—(a) Cases placed on calendar by clerk. After the expiration of the time for filing the main briefs of the parties, the case shall be placed upon the hearing calendar by the clerk.

(b) Requests for hearing at place other than Washington. The complainant, at the time of filing the complaint, or thereafter with leave of court, may file a written request for hearing at a place other than Washington. Copies of this request shall be served upon the respondent by the clerk as provided in Rule 9. If the respondent desires that the hearing be held at some place other than the place requested by the complainant, he shall file at the time he files the transcript a written request to that effect which shall state the place preferred by him. A copy of this request shall be served upon the complainant by the clerk.

(c) Place of hearing determined by chief judge. The chief judge will determine the place of hearing after considering any requests properly filed in the case and with due regard to the other cases pending in the court.

(d) Notice to parties. After a case has been placed upon the hearing calendar the clerk will, whenever possible not less than 10 days in advance, notify the parties of the time and place of hearing.

Rule 28. Hearing.—(a) Time allowed. At the hearing the complainant and the respondent shall each be allowed not more than 1 hour for oral argument, unless for good cause shown the court shall enlarge the time. The complainant shall be entitled to open and conclude the oral argument.

(b) Number of counsel. Not more than two counsel shall be heard for each side, complainant and respondent, in the argument of the case, except by special leave of the court, upon sufficient reason shown.

(c) Submission on briefs. Any case may be submitted on briefs, when reached in regular order, if counsel choose to submit it in that manner.

(d) Failure of counsel to appear. When a case is reached on the regular call, if briefs have been filed and no counsel appear to present oral argument, the case will be regarded as submitted on briefs.

(e) Failure of one party to appear. Where one party after filing brief fails to appear when the case is called for hearing, the court may hear argument on behalf of the party appearing and give judgment according to the right of the case.

(f) When brief for complainant only is filed and no counsel appears, case submitted. When a case is reached on the hearing calendar, if a brief has been filed for complainant only and no counsel appears to present oral argument, the case will be regarded as submitted.

(g) When case called and no brief filed by complainant, case may be dismissed. When a case is called for hearing and no brief has been filed for the complainant, the court at the instance of the respondent or on its own motion may have the complainant called and the case dismissed.

Rule 29. Fees and costs.—(a) Table of fees. The following table of fees (approved by the Supreme Court) to be charged by the clerk of this court is hereby fixed and established:

| | |
|--|---------|
| 1. Filing a complaint or petition and docketing a case (which shall also include the subsequent filing and indorsing of the transcript of proceedings) ----- | \$10.00 |
| 2. Entering an appearance ----- | .25 |
| 3. Filing a motion, order, or other paper (including the required copies thereof) ----- | .25 |
| 4. Filing required copies of each brief, for each party appearing ----- | 5.00 |
| 5. Transferring a case to the hearing docket ----- | 1.00 |
| 6. Issuing a subpoena or other writ or process ----- | \$0.50 |
| 7. Entering a continuance ----- | .25 |
| 8. Entering a judgment ----- | 1.00 |
| 9. Issuing a certified copy of judgment to the respondent governmental officer or agency on disposition of case ----- | 2.00 |
| 10. Entering any rule, or making or copying any record or other paper for each 100 words ----- | .20 |
| 11. Making a transcript of record for use in the Supreme Court of the United States, for each 100 words ----- | .20 |
| 12. For comparing any transcript, copy of record, or other paper not made by the clerk, with the original thereof, for each folio of 100 words ----- | .05 |
| 13. Every search of the records of the court ----- | 1.00 |
| 14. Affixing a certificate and a seal to any paper ----- | 1.00 |
| 15. Furnishing a typewritten or photostatic copy of any opinion of the court or any judge thereof certified under seal, for each 100 words (but not less than \$1 and not to exceed \$5 in the whole for any copy) ----- | .20 |
| 16. Furnishing a copy of a printed opinion of the court or any judge thereof, certified under seal ----- | 2.00 |
| 17. For an admission to the bar and certificate under seal, including filing of application and preliminary certificate and administering oath ----- | 3.00 |

(b) No costs for or against governmental officer or agency. No costs shall be allowed in this court for or against a governmental officer or agency, nor shall a governmental officer or agency be required to pay or make deposit for any of the fees herein provided for.

(c) Transcript to Supreme Court. In all cases removed to the Supreme Court by certiorari the fees of the clerk of this court shall be paid before a transcript of the record shall be delivered.

PROCEEDINGS UNDER HOUSING AND RENT ACT OF 1947, AS AMENDED

Rule 30. Filing of Recommendation of Local Board and Other Material—(a) **Filing and Docketing**—Notices. If the Housing Expediter does not approve a recommendation of a local advisory board in a defense-rental area as to a matter referred to in paragraph (A) or (B) of Section 204(e) (1) of the Housing and Rent Act of 1947, as amended, he shall within 35 days after the date of the receipt by him of the recommendation certify and file with the clerk of the court the recommendation, together with the record and statement of findings of the local advisory board, such statement as the Housing Expediter may desire to make as to his views on the matter, and such supporting information as the Housing Expediter deems appropriate. Upon the filing of the recommendation and other material, the clerk shall enter the case upon the docket in his office and shall assign a file number to it. The file number shall be noted on the docket and on the material filed by the Housing Expediter and all papers subsequently filed in the case. The clerk of the court thereupon, by mailing, shall serve appropriate notices upon the local board and the governor of the state involved of the filing of the transcript.

(b) Copies to be filed. One clearly legible copy of such recommendation and other material shall be filed with the clerk as provided in paragraph (a) of this rule. Three additional copies shall be filed at the same time, except that upon certification by the Housing Expediter that a lesser number of copies of any portion of the local board proceedings have been transmitted to him, the Housing Expediter may file only such additional copies thereof as are available. It shall be unnecessary in this court to print the recommendation or other material filed by the Housing Expediter.

(c) Correction. If anything material to the local board or the Housing Expediter is omitted from the matter filed by the Housing Expediter by error or accident or is misstated therein, the parties by stipulation, or this court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that supplementary material shall be certified and transmitted by the Housing Expediter.

(d) Transmittal of original papers—Physical exhibits. Whenever the Housing Expediter is of the opinion that original papers or exhibits should be inspected by the court or sent to the court in lieu of copies thereof, he may make such order therefor and for the safekeeping, transportation, and return thereof as he deems proper.

Rule 31. Appearances.—Counsel for the Housing Expediter shall enter his appearance at the time of filing the recommendation of a local board. Counsel for the local board which made the recommendation shall enter his appearance in support of the recommendation within 10 days after the recommendation has been filed with the clerk. Counsel for the state involved in the proceeding shall enter his appearance within 10 days after the recommendation has been filed with the clerk and shall at the same time state whether approval or disapproval of the recommendation is requested by the state.

Rule 32. Introduction of additional evidence to court.—Within 8 days after the Housing Expediter has filed with the court a recommendation of a local board accompanied by a statement of the Housing Expediter and supporting information deemed appropriate by him, the local board may file an application for leave to adduce additional evidence before the court in rebuttal to or explanation of such supporting information of the Housing Expediter. Such application shall contain an offer of proof with respect to the evidence sought to be adduced, setting forth the character and form of such evidence and a summary of what such evidence would show if admitted. Upon the filing of such application, the court may, by order, authorize such additional evidence to be adduced. Such additional evidence shall be adduced in affidavit or other duly authenticated written form, unless the court specifically directs that it be adduced in open court, by depositions or by written interrogatories.

Rule 33. Motions for summary disapproval.—Within 5 days after the filing of the recommendation of the local board and other material with the court, the Housing Expediter may file a motion for summary disapproval of the recommendation on the ground that the local board proceedings did not conform to paragraphs (A), (B), (C), or (D) of Section 204(e) (4) of the Housing and Rent Act of 1947, as amended. An answer to such motion may be filed by representatives of the local board or the state or states involved not later than 8 days after the motion has been filed. The court may thereupon enter an order denying the motion or disapproving the local board recommendation.

Rule 34. Withdrawal of Recommendation in Whole or in Part.—At any time before hearing, as provided in Rule 36 the local board may file with the court a motion to withdraw its recommendation, in whole or in part, on the ground that the recommendation or any portion thereof was erroneous when made or is believed to be erroneous on the basis of facts discovered after the proceedings were had by the local board, or for other reasons set forth in such motion. Upon the filing of such a motion, the court may enter an order disapproving the recommendation in whole or in part.

Rule 35. Briefs.—The Housing Expediter and the local board may file briefs in support of their respective positions on or before the day of hearing, but shall not be required to do so unless specifically so directed by the court. Any state or states which shall have appeared in the proceeding may also file briefs in support of their respective positions within the same period of time. The briefs shall comply in form as nearly as reasonably may be to the requirements of Rule 26.

Rule 36. Hearings.—Within 10 days after the recommendation of a local board has been filed with the court, or as soon thereafter as practicable, the chief judge will determine the time and place of hearing, unless the court directs that the proceeding be submitted for determination on the record and briefs without oral hearing. The time allowed for oral argument shall not exceed 1 hour for each party, unless for good cause shown the court shall enlarge the time, and, except by special leave of the court upon sufficient reason shown, not more than two counsel shall be heard for each party. The Housing Expediter shall be entitled to open and conclude the oral argument. The clerk will, whenever possible not less than 10 days in advance, notify the parties of the time and place of hearing.

Rule 37. Orders approving or disapproving recommendations.—An order approving or disapproving the recommendation of the local board will be entered by the court at or after the conclusion of the hearing and within the time limited by Section 204(e) (4) of the Housing and Rent Act of 1947, as amended. All orders shall be deemed entered upon filing with the clerk of the court and the clerk shall preserve the original orders.

Rule 38. Fees and Costs.—No fees or costs shall be charged or assessed in this court in proceedings under the Housing and Rent Act of 1947, as amended.

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